

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(1) DEFINITION; QUALIFICATIONS; APPOINTMENT/201. 'Auction' and 'auctioneer'.

AUCTION (

1. THE AUCTIONEER

(1) DEFINITION; QUALIFICATIONS; APPOINTMENT

201. 'Auction' and 'auctioneer'.

An auction is a manner of selling or letting property by bids, usually to the highest bidder by public¹ competition². The prices which the public is asked to pay are the highest which those who bid can be tempted to offer by the skill and tact of the auctioneer under the excitement of open competition³. Although the word 'auction' is derived from the Latin *auctio* (an increase), a 'Dutch auction' is one where property is offered at a certain price and then successively at lower prices until one is accepted⁴.

An auctioneer⁵ is an agent⁶ who sells goods or other property by auction⁷.

1 The term 'public' may be contrasted with 'private' auctions. There is no authoritative definition of public or private auction, but 'public' probably denotes that the general public has a right of attendance and participation as opposed to private auctions where specific persons only are invited to attend and participate. The distinction may be significant, for example, in relation to sales of land: see para 214 post.

2 There is no comprehensive statutory definition of an auction. The Mock Auctions Act 1961 refers to the necessity for competitive bidding: see para 245 post.

3 See *Frewen v Hays* (1912) 106 LT 516 at 518, PC, per Lord Macnaghten; and *Bexwell v Christie* (1776) 1 Cowp 395 at 397 per Lord Mansfield. However, there exist auctions where the lot goes to the highest bidder but the element of open competition is lacking in that bidders are unaware of rival bids. Postal auctions provide an example. These are conducted in a manner similar to that of selling by tenders. As to postal auctions see para 234 post.

4 See *Demerara Turf Club Ltd v Wight* [1918] AC 605, PC.

5 The use of the term 'auctioneer' in an apprenticeship deed or other instrument formerly imported that the person so described was duly licensed: see *Creaser v Hurley* (1915) 32 TLR 149. As to the abolition of auctioneers' licences see para 204 post.

6 As to agency of auctioneers see para 206 post.

7 *Wheatley v Smithers* [1906] 2 KB 321, DC (revsd on appeal on the facts: see *Wheatley v Smithers* [1907] 2 KB 684, CA). An auctioneer is not, however, an agent when he sells his own goods or property: see para 206 post.

UPDATE

201 'Auction' and 'auctioneer'

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(1) DEFINITION; QUALIFICATIONS; APPOINTMENT/202. Auctioneers in partnership.

202. Auctioneers in partnership.

A partnership for the purpose of carrying on the business of auctioneering is not subject to any restriction as to the number of persons who may constitute the partnership¹, provided that the partnership consists of persons the majority of whom are members of the Royal Institution of Chartered Surveyors² or members of a corresponding professional association³ in another EEA state⁴. Nor is a limited partnership for the purpose of carrying on the business of auctioneering subject to such restrictions, provided that the partnership consists of persons not less than three-quarters of the total number of whom are members of the Royal Institution of Chartered Surveyors or the Incorporated Society of Valuers and Auctioneers⁵ and provided also that not more than one quarter are limited partners⁶.

It has been held that a firm of auctioneers is not a trading partnership⁷, and therefore a member of the firm has no implied authority to bind his partners by giving a bill of exchange⁸ in the firm name⁹.

1 As to partnerships see generally **PARTNERSHIP**.

2 As to the Royal Institution of Chartered Surveyors see **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) para 284.

3 'Corresponding professional association' means an association or organisation the purpose of which is, in particular, to promote and maintain a high standard in professions involving one or more specified activities and which to that end: (1) prescribes, and enforces respect within its membership for, rules of professional conduct; (2) awards evidence of education and training to its members; and (3) confers on its members the right to use one or more professional titles, or designatory letters or to benefit from a status corresponding to that education and training: Partnerships (Unrestricted Size) No 14 Regulations 2000, SI 2000/486, reg 3. The specified activities are: (a) surveying; (b) auctioneering; (c) valuing; (d) marketing and management of land; (e) estate management; (f) advice on the use, appraisal, planning and development of land; (g) activities pursued in another EEA state which correspond to one or more of the activities listed in heads (a)-(f) supra: reg 2, Schedule. 'EEA state' means a state which is a contracting party to the Agreement on the European Economic Area (Oporto, 2 May 1992; EC 7 (1992); Cm 2183) as adjusted by the Protocol (Brussels, 17 March 1993; EC 2 (1993); Cm 2183): Partnerships (Unrestricted Size) No 14 Regulations 2000, SI 2000/486, reg 3.

4 See the Companies Act 1985 s 716(2)(d) (added by the Companies Act 1989 s 145, Sch 19 para 15(2)); and the Partnerships (Unrestricted Size) No 14 Regulations 2000, SI 2000/486, reg 2. See note 3 supra.

5 On 1 January 2000 the Incorporated Society of Valuers and Auctioneers merged with the Royal Institution of Chartered Surveyors: see the Royal Institution of Chartered Surveyors Press Release (7 December 1999).

6 See the Limited Partnership Act 1907 s 4(2) (amended by the Banking Act 1979 s 51(2), Sch 7); and the Limited Partnerships (Unrestricted Size) No 1 Regulations 1971, SI 1971/782, reg 2, Schedule. As to limited partnerships see **PARTNERSHIP** vol 79 (2008) PARA 218 et seq.

7 For the meaning of 'trading partnership' see **PARTNERSHIP** vol 79 (2008) PARA 6.

8 As to bills of exchange see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1400 et seq.

9 *Wheatley v Smithers* [1906] 2 KB 321, DC (revsd on appeal on the facts, but the court declined to express any view as to whether an auctioneer was a trader: see *Wheatley v Smithers* [1907] 2 KB 684, CA).

UPDATE

202 Auctioneers in partnership

NOTE 4--Companies Act 1985 s 716 repealed: Regulatory Reform (Removal of 20 Member Limit in Partnerships etc.) Order 2002, SI 2002/3203.

NOTE 6--Limited Partnership Act 1907 s 4(2) further amended: SI 2002/3203.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(1) DEFINITION; QUALIFICATIONS; APPOINTMENT/203. Qualifications for practice.

203. Qualifications for practice.

No special qualification is required by one who carries on the business of an auctioneer¹. Any person is at liberty to do so, provided that he complies with the companies legislation, where it applies². An auctioneer is under no obligation to become a member of a professional association, but if he does so, he is bound by the rules of conduct laid down by the association of which he is a member³.

1 For the meaning of 'auctioneer' see para 201 ante.

2 As to companies legislation see **COMPANIES**. Note that there are provisions which require the majority of the persons constituting a partnership for the purpose of carrying on the business of auctioneering to be members of a professional body: see para 202 ante.

3 *Faraday v Auctioneers' and Estate Agents' Institute of United Kingdom* [1936] 1 All ER 496, CA.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(1) DEFINITION; QUALIFICATIONS; APPOINTMENT/204. Licensing requirements.

204. Licensing requirements.

An auctioneer¹ does not require any general auctioneers' licence for the purposes of carrying on his business², and a person hawking goods from place to place for sale by auction³ no longer requires a hawker's licence⁴. However, several London boroughs have introduced codes of practice and licence conditions relating to auctions conducted within their localities, which regulate such matters as display of name, conduct of bidding, post-sale advertising and declarations as to ownership of goods⁵.

An auctioneer requires an excise licence for the sale of excisable commodities⁶.

An auctioneer may sell by auction, expose for sale by auction or have in his possession for sale by auction a firearm⁷ or ammunition⁸ without being registered as a firearms dealer⁹, if he has obtained from the chief officer of police¹⁰ for the area¹¹ in which the auction is held a permit¹² and complies with the terms of the permit¹³. The auctioneer or his servant may possess firearms or ammunition in the ordinary course of his business as an auctioneer without holding a firearms certificate¹⁴. The offence of carrying, without lawful authority or reasonable excuse, a loaded shot gun, loaded air weapon, or any other firearm together with suitable ammunition, in a public place may be committed if, at the material time, the public has or is permitted to have access, whether on payment or otherwise, to the premises or place¹⁵.

An auctioneer who advances money on bills of sale¹⁶ with a view to obtaining business, and not with the primary object of lending money, does not require a licence¹⁷.

The exportation of certain classes of goods may be subject to licensing under powers derived from the Import, Export and Customs Powers (Defence) Act 1939¹⁸. Most antiques and collectable items produced more than 50 years before exportation are subject to an open general export licence, but those which are not require a specific licence¹⁹. Regular exporters may obtain bulk licences. Sales at auction in contravention of this licensing regime will render the auctioneer, as agent of the vendor, liable to criminal penalties²⁰.

Except in relation to certain wild birds specified in the Wildlife and Countryside Act 1981²¹, the sale or offering or exposing for sale of any live wild bird, or an egg or any part of such, or any dead wild bird or any part of, or anything derived from it, is an offence unless licensed to do so²².

1 For the meaning of 'auctioneer' see para 201 ante.

2 The excise duty on auctioneers' licences was abolished and the provisions of the Auctioneers Act 1845 requiring auctioneers' licences were repealed by the Finance Act 1949 s 14, Sch 11 Pt I.

3 For the meaning of 'auction' see para 201 ante.

4 The requirement of a hawker's licence under the Hawkers Act 1888 was repealed by the Local Government Act 1966 ss 35, 43, Sch 3 Pt I, Sch 6 Pt I. As to hawkers see further **MARKETS, FAIRS AND STREET TRADING** vol 29(2) (Reissue) para 1117 et seq.

5 The conditions are made pursuant to the Greater London Council (General Powers) Act 1984 s 28(3).

6 See the Customs and Excise Management Act 1979 s 101 (amended by the Finance Act 1986 s 8(6), Sch 5 para 1; and the Finance Act 1994 s 9, Sch 4 para 5). As to excisable commodities see **CUSTOMS AND EXCISE** vol 12(2) (2007 Reissue) para 389 et seq; and as to excise licenses see **CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) para 622 et seq.

7 'Firearm' means a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged and includes: (1) any prohibited weapon, whether it is such a lethal weapon or not; (2) any component part of such a lethal or prohibited weapon; and (3) any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon: see the Firearms Act 1968 s 57(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 630.

8 'Ammunition' means ammunition for any firearm and includes grenades, bombs and other like missiles, whether capable of use with a firearm or not, and also includes prohibited ammunition: *ibid* s 57(2).

9 'Firearms dealer' means a person who, by way of trade or business, manufactures, sells, transfers, repairs, tests or proves firearms or ammunition to which *ibid* s 1 (as amended) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) paras 630-634) applies or shot guns: s 57(4). 'Registered', in relation to a firearms dealer, means registered either: (1) in Great Britain, under s 33 (as amended) (police register) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 688); or (2) in Northern Ireland, under the corresponding legislation: s 57(4). For the meaning of 'shot gun' see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 632.

10 As to the chief officer of police see **POLICE** vol 36(1) (2007 Reissue) para 178 *et seq.*

11 'Area' means a police area: Firearms Act 1968 s 57(4).

12 Is a permit in the form prescribed by the Secretary of State: *ibid* ss 9(2), 57(4). For the form of permit see the Firearms Rules 1998, SI 1998/1941, r 9(2)(a), Sch 4 Pt III (auctioneer's firearm permit), r 9(2)(b), Sch 4 Pt IV (auctioneer's shot gun permit). 'Secretary of State' means one of Her Majesty's Principal Secretaries of State: Interpretation Act 1978 s 5, Sch 1.

It is an offence for a person knowingly or recklessly to make a statement false in any material particular for the purpose of procuring, either for himself or for another person, the grant of a permit under the Firearms Act 1968 s 9(2) (see the text and notes 7-11 *supra*, and the text and note 13 *infra*): s 9(3) (amended by the Firearms (Amendment) Act 1997 s 52, Sch 2 para 2(2)).

13 Firearms Act 1968 s 9(2). If the auctioneer does not have such a permit, or if he does not comply with the terms of his permit, he commits an offence: see s 3(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 636. As to the auction of firearms see also para 265 *post*.

14 *Ibid* s 9(1). For offences in relation to s 9(1) see the Firearms (Amendment) Act 1988 s 14; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 648. For the meaning of 'certificate' see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 637.

15 See *ibid* ss 19, 57(4).

16 As to bills of sale see generally **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1620 *et seq.*

17 *Furber v Fieldings Ltd* (1907) 23 TLR 362. As to licences to carry on consumer credit, consumer hire or ancillary credit businesses see the Consumer Credit Act 1974 Pt III (ss 21-41) (as amended); and **CONSUMER CREDIT** vol 9(1) (Reissue) para 121 *et seq.*

18 See the Import, Export and Customs Powers (Defence) Act 1939 s 1 (as amended); and **TRADE AND INDUSTRY** vol 97 (2010) PARA 808 *et seq.*

19 See the Export of Goods (Control) Order 1992, SI 1992/3092, art 2, Sch 1 Pt 1 Group 2.

20 See the Import, Export and Customs Powers (Defence) Act 1939 s 3(1) (amended by the Customs and Excise Management Act 1979 s 177(1), Sch 4 para 12; and by virtue of the Criminal Justice Act 1982 ss 37, 38, 46). For the penalties see **TRADE AND INDUSTRY** vol 97 (2010) PARA 810.

21 Is the Wildlife and Countryside Act 1981 s 6, Sch 3 (birds which may be sold): see **ANIMALS** vol 2 (2008) PARA 1007.

22 See *ibid* s 6(1), (2) (s 6(2) amended by the Countryside and Rights of Way Act 2000 ss 81(1), 102, Sch 12 paras 3, 10(6), Sch 16 Pt IV), the Wildlife and Countryside Act 1981 s 16(4); and **ANIMALS** vol 2 (2008) PARAS 1006, 1007, 1019. As to the auction of wild animals see also para 264 *post*.

UPDATE

204 Licensing requirements

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

NOTE 4--1966 Act s 43 repealed: Statute Law (Repeals) Act 2004.

NOTE 19--SI 1992/3092 lapsed. See now Export Control Order 2008, SI 2008/3231; and **TRADE AND INDUSTRY** vol 97 (2010) PARA 817 et seq.

NOTE 20--1939 Act s 3(1) further amended: Export Control Act 2002 s 15(3)(a).

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(1) DEFINITION; QUALIFICATIONS; APPOINTMENT/205. Form of contract between vendor and auctioneer.

205. Form of contract between vendor and auctioneer.

There are no special rules affecting the form of contract¹ between the vendor and the auctioneer², and, subject to the ordinary exceptions common to all forms of agency, the contract may be either oral or in writing³.

1 As to forms of contract generally see **CONTRACT** vol 9(1) (Reissue) para 620 et seq.

2 For the meaning of 'auctioneer' see para 201 ante.

3 See *Coles v Trecothick* (1804) 9 Ves 234; and **AGENCY** vol 1 (2008) PARAS 14, 19.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(2) AUCTIONEER'S AUTHORITY/206. Agency of auctioneer.

(2) AUCTIONEER'S AUTHORITY

206. Agency of auctioneer.

An auctioneer¹ is primarily the agent of the vendor². He can, however, sell his own property and a purchaser can take no objection to the sale on that ground³. Hitherto, the auctioneer was also treated as the purchaser's agent⁴ for the limited purpose of signing on his behalf such notes or memoranda of sale as were formerly required, but this is no longer the case⁵.

It is clear that the auctioneer is the agent of the vendor. Whereas an estate agent has (usually) only a revocable mandate to bring about a stipulated result⁶ the auctioneer is a 'skilled agent to whom complete control of operations is given by the owner of the goods'⁷. He is employed, therefore, as an independent contractor rather than as an employee⁸.

1 For the meaning of 'auctioneer' see para 201 ante.

2 As to agency of auctioneers see further **AGENCY** vol 1 (2008) PARA 13.

3 *Flint v Woodin* (1852) 22 LJ Ch 92.

4 See *Chaney v Maclow* [1929] 1 Ch 461, CA; *Sims v Landray* [1894] 2 Ch 318; *Bell v Balls* [1897] 1 Ch 663, 66 LJ Ch 397; *Van Praagh v Everidge* [1902] 2 Ch 266, 71 LJ Ch 598 (revsd on the ground that there was no sufficient memorandum: *Van Praagh v Everidge* [1903] 1 Ch 434, 72 LJ Ch 260, CA); *Phillips v Butler* [1945] Ch 358, [1945] 2 All ER 258.

5 The requirement for written formalities was contained in the Law of Property Act 1925 s 40, which has since been repealed. It is replaced by the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) requiring written contracts, but not in relation to public auctions of land: see **SALE OF LAND** vol 42 (Reissue) para 29.

6 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL.

7 *Walker v Crabb* (1917) 61 Sol Jo 219 at 220 per Atkin J.

8 *Walker v Crabb* (1917) 61 Sol Jo 219. For the meaning of 'employee' see **EMPLOYMENT** vol 39 (2009) PARA 2. As to the distinction between contract of service and contract for service see **EMPLOYMENT** vol 39 (2009) PARA 1.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(2) AUCTIONEER'S AUTHORITY/207. Extent of authority.

207. Extent of authority.

Apart from express instructions enlarging or limiting it, the implied authority of the auctioneer¹ is a general authority to sell by auction² and deal in the way usual and customary amongst auctioneers³. The authority does not extend so as to make the vendor liable for injury caused by the auctioneer's negligence to a person attending the sale unless the vendor has instructed the auctioneer to do any unlawful act or thing whereby the injury was caused⁴.

An auctioneer has no implied authority to conclude a sale by private contract⁵, even if the sale proves abortive and he is offered more than the reserve price⁶. If however, the vendor accepts a purchaser introduced by the auctioneer, and himself concludes a sale to that purchaser by private treaty, the auctioneer has a right to claim remuneration⁷.

In some cases, where property has not reached its reserve and has been bought in, and immediately afterwards the auctioneer has sold the property at the reserve price to a person present at the bidding, the sale has been held good as, in effect, a sale by auction⁸. The true ratio decidendi of these cases, however, would seem to be that the instructions to sell were primarily to raise a minimum price pursuant to a court order or terms of compromise of a dispute, with sale by auction merely being stipulated as a convenient method of sale. Moreover, these cases involved claims by principals to enforce contracts against reluctant purchasers. Such claims could have succeeded simply on the basis of ratification. It would therefore be unsafe to regard these cases as authority for the proposition that a power to sell otherwise than by auction would be implied. In one case where a vendor was held bound by a private treaty sale effected by the auctioneer after the reserve was not reached at auction, the overriding object of the sale was held to be to achieve a minimum price howsoever obtained, the auction being merely the preferred method⁹.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Howard v Braithwaite* (1812) 1 Ves & B 202 at 210; *Hawkins v Rogers* [1951] IR 48 at 59 per Dixon J. See also *Toulmin v Millar* (1887) 3 TLR 836, HL, per Lord Watson. For the meaning of 'auction' see para 201 ante.

3 *Collen v Gardner* (1856) 21 Beav 540. Guidance notes for good practice have been issued by the Royal Institution of Chartered Surveyors and by the Society of Fine Art Auctioneers.

4 *Walker v Crabb* (1916) 33 TLR 119 (where the auctioneer was liable in respect of injuries caused by an unruly mare, and the vendor was held not to be liable, notwithstanding that the sale was carried out on his premises, because both the sale and the chattel were entirely within the control of the auctioneer).

5 *Marsh v Jelf* (1862) 3 F & F 234.

6 *Daniel v Adams* (1764) Amb 495; *Re Loft* (1844) 2 LTOS 397.

7 *Green v Bartlett* (1863) 14 CBNS 681 (where the authority to sell otherwise than by auction was express). As to remuneration see para 223 post.

8 *Else v Barnard, ex p Courtauld* (1860) 28 Beav 228; *Bousfield v Hodges* (1863) 33 Beav 90.

9 *Garnier v Bruntlett* (1974) 236 Estates Gazette 867 (sale to realise security).

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(2) AUCTIONEER'S AUTHORITY/208. Sale below reserve price.

208. Sale below reserve price.

If a reserve price is fixed¹ by the vendor and the sale or lot is expressed to be subject to a reserve, the auctioneer² has no authority to sell below it³. If he purports to do so no contract is concluded between the vendor and purchaser as all bids amount only to conditional offers and any acceptance is similarly conditional on the reserve being reached or exceeded⁴. Moreover the auctioneer cannot be liable to the disappointed buyer for breach of any warranty of authority to sell to the highest bidder below reserve in the face of an express 'subject to reserve sale'⁵.

Where the sale is notified to be subject to the vendor's right to fix a reserve, the auctioneer is similarly unable to sell below any reserve actually set and the purchaser is put on notice as to whether one has been fixed⁶.

It may be that an auctioneer announces a sale to be without reserve where, in fact, the vendor has fixed one. In such a case a valid contract may be enforceable by a purchaser who has bid below the reserve⁷.

Conversely if no reserve is fixed and the auctioneer rightly advertises the sale as 'without reserve', liability will attach to the auctioneer if, subsequently, the vendor withdraws the lot, buys it in or fixes a reserve so that it is not sold to the highest bidder, and although no sale will in these circumstances be achieved the auctioneer will be liable on a collateral contract that the sale be without reserve⁸. It is suggested that in such a case the auctioneer would be able to look to the vendor-principal for indemnification⁹. The position would be otherwise if it is the auctioneer who unilaterally withdraws the lot after bidding has commenced¹⁰.

1 It should be expressly set. The courts may not imply the setting of reserves: *Nelson v Hicks* (1899) QR 15 SC 465 (no implication that sales were subject to reserves by reason only of the fact that the goods were sent to the auctioneer accompanied by invoices).

2 For the meaning of 'auctioneer' see para 201 ante.

3 *McManus v Fortescue* [1907] 2 KB 1, CA.

4 *McManus v Fortescue* [1907] 2 KB 1, CA. As to offer and acceptance see **CONTRACT** vol 9(1) (Reissue) para 631.

5 *McManus v Fortescue* [1907] 2 KB 1, CA.

6 *Fay v Miller, Wilkins & Co* [1941] Ch 360, [1941] 2 All ER 18, CA (where the auctioneers were liable, however, for breach of warranty of authority having gone on to effect a memorandum as then required by the Law of Property Act 1925 s 40 (now repealed: see para 206 note 5 ante) thus rendering the contract no longer conditional).

7 See *Rainbow v Hawkins* [1904] 2 KB 322, DC, where it was held that the auctioneer had apparent authority to sell without reserve in the absence of any express notice to the contrary. This was expressly doubted in *McManus v Fortescue* [1907] 2 KB 1, CA, where, however, the existence of a reserve was expressly notified. The finding of apparent authority defeated the claim for breach of warranty of authority. The buyers also failed to enforce the contract of sale, notwithstanding that the auctioneer was held to be authorised to effect it, since no memorandum as then required by the Sale of Goods Act 1893 s 4 (now repealed) was signed.

8 *Warlow v Harrison* (1859) 1 E & E 309. The contract is made by the auctioneer making a unilateral offer to this effect which is accepted by the highest bona fide bidder by virtue of his bid: see *Warlow v Harrison* supra at 316-317 per Martin B (obiter). This analysis was approved and employed in *Tully v Irish Land Commission* (1961) 97 ILT 174; and in *Barry v Heathcote Ball & Co (Commercial Auctions) Ltd* [2001] 1 All ER 944, sub nom

Barry v Davies (t/a Heathcote Ball & Co) [2000] 1 WLR 1962, CA. Cf *Fenwick v Macdonald, Fraser & Co Ltd* (1904) 6 F 850, Ct of Sess.

9 *Warlow v Harrison* (1859) 1 E & E 309.

10 See *Barry v Heathcote Ball & Co (Commercial Auctions) Ltd* [2001] 1 All ER 944, sub nom *Barry v Davies (t/a Heathcote Ball & Co)* [2000] 1 WLR 1962, CA.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(2) AUCTIONEER'S AUTHORITY/209. Authority to receive payment.

209. Authority to receive payment.

An auctioneer¹ has implied authority to receive the deposit on sales both of land and of goods², but no implied authority by virtue of his agency³ alone to receive the purchase money⁴. Thus a purchaser who pays the purchase money to an auctioneer who lacks express authority to receive it is not discharged from liability to the vendor. Where in a sale of goods, as is generally the case, the conditions contemplate that the auctioneer is to complete the sale, the position is different and he is then usually authorised to receive the purchase money⁵. This does not mean necessarily that he is under a duty to collect the price⁶.

The auctioneer has authority to receive payment of the deposit by cash. He may accept a cheque⁷, provided he exercises reasonable caution, but cannot be compelled to do so⁸. This authority is confined to cheques presently payable, and does not extend to receiving payment of the deposit by bill of exchange⁹ or post-dated cheque¹⁰. He cannot give credit¹¹, or allow a set-off due from the vendor to the purchaser¹². Otherwise the auctioneer has no right, in the absence of express instructions, to take payment of the purchase money otherwise than in cash¹³.

Where the auctioneer has received payment by cheque or bill of exchange without or in excess of any express or implied authority, the vendor is not bound by the payment, the purchaser still remains liable¹⁴ and the auctioneer may be sued by the vendor for any damages sustained by him¹⁵. Where the auctioneer does receive the deposit he should do so as agent for the vendor rather than as stakeholder¹⁶ in order to protect his lien¹⁷. Normally, however, he will hold it as stakeholder.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Mynn v Joliffe* (1834) 1 Mood & R 326; *Williams v Millington* (1788) 1 Hy Bl 81; *Capel v Thornton* (1828) 3 C & P 352; *Butwick v Grant* [1924] 2 KB 483, DC.

3 As to agency of auctioneers see para 206 ante.

4 *Drakeford v Piercy* (1866) 7 B & S 515; *Butwick v Grant* [1924] 2 KB 483, DC.

5 *Sykes v Giles* (1839) 5 M & W 645.

6 See *Fordham v Christie, Manson & Woods Ltd* (1977) 121 Sol Jo 529, 244 Estates Gazette 213. See also para 222 post.

7 *Farrer v Lacy, Hartland & Co* (1885) 31 ChD 42, CA.

8 *Johnston v Boyes* [1899] 2 Ch 73.

9 As to bills of exchange see generally **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1400 et seq.

10 *Williams v Evans* (1866) LR 1 QB 352; *Papé v Westacott* [1894] 1 QB 272, CA.

11 *Williams v Evans* (1866) LR 1 QB 352; *Papé v Westacott* [1894] 1 QB 272, CA.

12 *Brown v Staton* (1816) 2 Chit 353.

13 *Earl Ferrers v Robins* (1835) 2 Cr M & R 152; *Sykes v Giles* (1839) 5 M & W 645.

14 *Sykes v Giles* (1839) 5 M & W 645. See *Hodgens v Keon* [1894] 2 IR 657; and *Boothman v Byrne* (1923) 57 ILT 36.

- 15 *Earl Ferrers v Robins* (1835) 2 Cr M & R 152.
- 16 As to auctioneers as stakeholders see para 250 post.
- 17 As to auctioneers' lien see para 224 post.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(2) AUCTIONEER'S AUTHORITY/210. Authority to warrant.

210. Authority to warrant.

It used to be the case that an auctioneer¹ had no authority, except by express instructions, to give a warranty at the auction², and that an unauthorised warranty would not bind the vendor³. However, it is now the case that an agent⁴ may have usual or apparent authority to make warranties binding on his principal⁵. Where the auctioneer does make unauthorised representations, he may be personally liable to the purchaser for breach of warranty of authority⁶. He will also have to indemnify his vendor if he makes representations rendering the latter liable to the purchaser, for example in misrepresentation⁷.

If a vendor makes it clear that his descriptions are to be applied to the lots, the auctioneer will be liable to him for any loss caused by his failure to do so⁸.

1 For the meaning of 'auctioneer' see para 201 ante.

2 For the meaning of 'auction' see para 201 ante.

3 *Payne v Lord Leconfield* (1882) 51 LJQB 642.

4 As to agency of auctioneers see para 206 ante.

5 See *Mendelssohn v Normand Ltd* [1970] 1 QB 177 at 183-184, [1969] 2 All ER 1215 at 1218, CA, per Lord Denning MR (an oral promise or a representation of fact made by one party which induces the other to contract can be relied on provided apparent authority to make such a statement exists). This proposition was considered in the context of auctions with regard to a representation relating to the property made by the auctioneer before sale, and it was held that the vendor was not liable for misrepresentation as he had expressly drawn the attention of the public to the limits placed upon the auctioneer's authority to make binding representations: see *Overbrooke Estates Ltd v Glencombe Properties Ltd* [1974] 3 All ER 511, [1974] 1 WLR 1335 (approved in *Collins v Howell-Jones* [1981] 2 EGLR 108, (1980) 259 Estates Gazette 331, CA; and applied in *Moore v Khan-Ghouri* [1991] 2 EGLR 9, [1991] 32 EG 63, CA). This suggests that in the absence of such a notification the representation could have been binding on the vendor. Clearly, where the vendor does authorise the representation, he will be bound by it: *Museprime Properties Ltd v Adhill Properties Ltd* (1990) 61 P & CR 111, [1990] 2 EGLR 196.

6 See para 255 post.

7 See para 257 post.

8 *Brown v Draper & Co* (1975) 233 Estates Gazette 929, CA.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(2) AUCTIONEER'S AUTHORITY/211. Delegation of authority.

211. Delegation of authority.

An agent has no power, without the authority of his principal, to delegate his agency to another¹. It follows that an auctioneer² employed to sell must, in general, effect the sale himself³. Thus, he cannot delegate to his clerk⁴, unless the principal has clearly assented. Different considerations would arise where the principal instructs a firm of auctioneers rather than an individual, but it would seem that even then only a person practising as an auctioneer would be impliedly authorised⁵.

The context in which the question of delegation has most commonly arisen is that of signature by a clerk of the memoranda formerly required in sales both of land and of goods⁶. Such signature might be made on behalf of either vendor or purchaser. Whilst the authorities themselves are not particularly strong, there exist categorical dicta that the auctioneer had no usual or implied authority to delegate the signing of a memorandum to his clerk so as to bind the vendor⁷. It appears to be free from doubt that there is no implied power to delegate signature to the clerk so as to bind the purchaser⁸.

All matters incidental to the sale which it might be useful to delegate should be expressly agreed between the parties. It is within the clerk's authority to receive the deposit⁹.

1 *Delegatus non potest delegare*: see **AGENCY** vol 1 (2008) PARA 48 et seq.

2 For the meaning of 'auctioneer' see para 201 ante. As to agency of auctioneers see para 206 ante.

3 *Coles v Trecothick* (1804) 9 Ves 234; *Henderson v Barnewall* (1827) 1 Y & J 387.

4 *Coles v Trecothick* (1804) 9 Ves 234; *Henderson v Barnewall* (1827) 1 Y & J 387; *Bird v Boulter* (1833) 4 B & Ad 443.

5 *Wilson & Sons v Pike* [1949] 1 KB 176, [1948] 2 All ER 267, CA. See para 214 post.

6 See para 206 note 5 ante.

7 *Gosbell v Archer* (1835) 2 Ad & El 500 (although here the clerk clearly signed only as a witness); *Peirce v Corf* (1874) LR 9 QB 210 (clerk signing sales ledger not shown to bidders). However, contrast *Dyas v Stafford* (1881) 7 LR IR 590.

8 *Bell v Balls* [1897] 1 Ch 663. As to the nature and exercise of authority to sign contracts see para 214 post.

9 *Gosbell v Archer* (1835) 2 Ad & El 500.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(2) AUCTIONEER'S AUTHORITY/212. Termination of authority.

212. Termination of authority.

The agency of the auctioneer¹ is normally an agency for sale by auction² only³, and therefore, when the property has been knocked down, the auctioneer's authority is at an end except for the purpose of carrying out the contract made at the auction. He cannot introduce into it any stipulations as to title⁴. Normally the auctioneer cannot accept rescission of the contract⁵.

1 For the meaning of 'auctioneer' see para 201 ante. As to agency of auctioneers see para 206 ante.

2 For the meaning of 'auction' see para 201 ante.

3 *Seton v Slade* (1802) 7 Ves 265 at 276 per Lord Eldon LC. See also *Blackburn v Scholes* (1810) 2 Camp 341.

4 *Seton v Slade* (1802) 7 Ves 265.

5 *Nelson v Aldridge* (1818) 2 Stark 435. Contrast *Stevens v Legh* (1853) 22 LTOS 84, where the vendor failed in his claim for breach of contract against the auctioneer who had returned the purchase price after fraud had been discovered. It is fairly common for auctioneers' conditions to provide expressly for a right to accept rescission, for example, where a forgery is discovered. Where an auctioneer gives the buyer a right to return a forgery as in *Marie Zelinger de Balkany v Christie, Manson & Woods Ltd* (1995) 16 Tr LR 163, he should ensure that he has such a right expressed in his consignment contract with his seller-client. As to rescission of contract see **CONTRACT** vol 9(1) (Reissue) para 1014.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(2) AUCTIONEER'S AUTHORITY/213. Revocation of authority.

213. Revocation of authority.

Up to the time of the conclusion of the sale, and until the property is finally knocked down, the auctioneer's¹ authority is revocable either expressly or in any of the events which ordinarily determine agencies², unless the contract is such as to give the auctioneer an authority coupled with an interest³.

The authority can be withdrawn even though the auctioneer has incurred expenses⁴ and advertised the property for sale⁵, as the advertisement is the act of the auctioneer and he has no ostensible authority to make representations as to the existence or extent of his own authority. The auctioneer will be liable in trespass if, after the determination of his authority, he insists on entering the vendor's premises for the purpose of effecting a sale⁶.

If the authority has in fact been revoked, the auctioneer can give the highest bidder no right to the property, even though the bidder is unaware of the revocation⁷. It remains to be decided whether, unlike an estate agent, an auctioneer can, in the absence of express contractual provision, recover damages on the revocation of his authority for preventing him from earning his commission⁸. It may be said that an auctioneer contracts to put the property to auction⁹, and is therefore obliged, in contradistinction to an estate agent, to endeavour to sell the property in that fashion.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Warlow v Harrison* (1859) 1 E & E 309, Ex Ch. However, if the property is sold 'without reserve', revocation after bidding had commenced would render the auctioneer, and, in these circumstances, his principal liable on the collateral contract to sell to the highest bona fide bidder: see para 208 ante. As to the agency of auctioneers see para 206 ante. As to the termination of agency see **AGENCY** vol 1 (2008) PARA 170 et seq.

3 For example, if an auctioneer is entrusted with goods for sale to repay previous advances, the authority is irrevocable: see *Charlesworth v Mills* [1892] AC 231 at 243, HL. The authority is not, however, irrevocable if the auctioneer pays money on the understanding that he is to sell the goods and recoup himself from the proceeds of sale: *Chinnock v Sainsbury* (1860) 30 LJ Ch 409. As to irrevocable authority see **AGENCY** vol 1 (2008) PARA 171 et seq.

4 *Taplin v Florence* (1851) 10 CB 744. The auctioneer does not, however, lose his right to be indemnified against the expenses he has incurred: see para 225 post.

5 *Warlow v Harrison* (1859) 1 E & E 309, Ex Ch; *Taplin v Florence* (1851) 10 CB 744.

6 *Taplin v Florence* (1851) 10 CB 744.

7 *Manser v Back* (1848) 6 Hare 443.

8 See *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL; and *Warlow v Harrison* (1859) 1 E & E 309 at 317, Ex Ch, per Martin B. It is common for auctioneers' conditions of trading specifically to provide for payment in the event of withdrawal of lots.

9 For the meaning of 'auction' see para 201 ante.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(2) AUCTIONEER'S AUTHORITY/214. Nature and exercise of authority to sign contract.

214. Nature and exercise of authority to sign contract.

As has been stated¹, it is no longer the case that a contract for the sale or other disposition of an interest in land made at public auction² must be evidenced in writing and the requirement of writing in the case of sales of land does not apply³. Thus the well established implied authority to sign a memorandum evidencing the sale on behalf of the vendor and purchaser is no longer of relevance. In order to achieve evidential certainty of the terms of the contract of sale, which can now be made orally⁴, it can be made a term of that contract that the parties sign a contract containing the terms. Alternatively, the terms under which the bidding is conducted may prevent a contract arising at the fall of the hammer and provide that one only comes into existence when such signed documentation is effected. If, in this latter situation, it is sought to permit the auctioneer to act as agent⁵ in signing, that authority must be expressly given.

1 See para 206 note 5 ante.

2 For the meaning of 'auction' see para 201 ante.

3 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); and **SALE OF LAND** vol 42 (Reissue) para 29.

4 As to oral contracts see **CONTRACT** vol 9(1) (Reissue) para 620.

5 As to agency of auctioneers see para 206 ante.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(3) AUCTIONEER'S DUTIES TO VENDOR/(i) General Duties/215. Exercise of skill and knowledge.

(3) AUCTIONEER'S DUTIES TO VENDOR

(i) General Duties

215. Exercise of skill and knowledge.

Being a person who professes to carry on a business requiring skill and knowledge, an auctioneer¹ must display such skill and knowledge in acting for his vendor as is reasonably to be expected from competent auctioneers, and must follow the course of business ordinarily recognised by custom² or prescribed by statute³. In the exercise of skill and knowledge by an auctioneer, the standard of care will vary depending upon whether he is regarded as a specialist or a general practitioner⁴. If the former, he will not be liable if, albeit that there is a body of professional opinion which considers that the actions were wrong, there also exists an equally competent body of professional opinion which supports the manner in which the auctioneer carried out his duty⁵. An auctioneer who is a 'general practitioner' will be regarded as negligent only if it is found that no auctioneer of ordinary skill and care would have acted as he did⁶.

An auctioneer will be liable in damages for a breach of any duty, nominal where no material injury results⁷, or substantial and of an amount to compensate the vendor for any actual loss sustained through the negligence of the auctioneer⁸ or of persons employed by him⁹. It is not negligent for an auctioneer, in the exercise of his judgment, not to insist upon a payment of a deposit by a purchaser¹⁰. However, it has been held to be negligent to allow the purchaser to take away the goods before he has paid the price¹¹.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Russell v Hankey* (1794) 6 Term Rep 12; *Denew v Daverell* (1813) 3 Camp 451; *Jones v Nanney* (1824) 13 Price 76. Guidance notes for good practice have been issued by the Royal Institution of Chartered Surveyors and by the Society of Fine Art Auctioneers.

3 See the Supply of Goods and Services Act 1982 s 13 (implied term about care and skill); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 97. See also *Coppen v Moore (No 2)* [1898] 2 QB 306; *Christie, Manson and Woods v Cooper* [1900] 2 QB 522.

4 *Luxmoore-May v Messenger May Baverstock (a firm)* [1990] 1 All ER 1067, [1990] 1 WLR 1009, CA (applying *Maynard v West Midlands Regional Health Authority* [1985] 1 All ER 635, [1984] 1 WLR 634, HL).

5 See *Alchemy (International) Ltd v Tattersalls (Ltd)* [1985] 2 EGLR 17, 276 Estates Gazette 675.

6 *Luxmoore-May v Messenger May Baverstock (a firm)* [1990] 1 All ER 1067, [1990] 1 WLR 1009, CA. As to negligence see generally **NEGLIGENCE**.

7 *Hibbert v Bayley* (1860) 2 F & F 48.

8 *Parker v Farebrother* (1853) 21 LTOS 128.

9 *Lord North's Case* (1557) 2 Dyer 161a. As to damages see generally **DAMAGES**.

10 *Cyril Andrade Ltd v Sotheby & Co* (1931) 47 TLR 244 (deposit was only payable by the purchaser 'if required to do so'). Cf *Hibbert v Bayley* (1860) 2 F & F 48, where there was a condition that the highest bidder should immediately pay a deposit, and it was held to be negligent to allow him to leave without doing so.

11 *Brown v Staton* (1816) 2 Chit 353. See para 217 post.

UPDATE

215-217 Exercise of skill and knowledge ... Duties in respect of goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(3) AUCTIONEER'S DUTIES TO VENDOR/(i) General Duties/216. Duty to describe the property accurately.

216. Duty to describe the property accurately.

The auctioneer¹ will generally be under an obligation in tort, and may be specifically required by contract, to describe the vendor's property with such care as is necessary in order to ensure that a proper price is obtained². This may involve a duty to research and value a lot³.

Unless the contract between the auctioneer and the vendor permits the auctioneer to apply his own descriptions to the property he must apply any descriptions expressly or impliedly instructed, and if he fails to do so will be liable in damages for the difference between the price achieved and that which the property would have realised if it had been described as instructed⁴.

If the auctioneer describes the property without authority or in breach of his duty to the vendor so that the latter becomes liable to the purchaser (for example, under the Misrepresentation Act 1967⁵ or under the Sale of Goods Act 1979⁶), the auctioneer will be liable to indemnify the vendor for causing that loss; it is otherwise if the misdescriptions are authorised⁷.

There are statutory criminal sanctions in certain circumstances where an auctioneer sells misdescribed goods or land⁸.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, [1971] 2 All ER 633, CA.

3 *Luxmoore-May v Messenger May Baverstock (a firm)* [1990] 1 All ER 1067, [1990] 1 WLR 1009, CA.

4 *Brown v Draper & Co* (1975) 119 Sol Jo 300, 233 Estates Gazette 929, CA.

5 A misrepresentation can take the form of a misleading photograph: see *Atlantic Estates plc v Ezekiel* [1991] 2 EGLR 202, [1991] 35 EG 118, CA (depiction was of a thriving wine bar, but in fact the liquor licence had been revoked); *St Marylebone Property Co Ltd v Payne* [1994] 2 EGLR 25, [1994] 45 EG 156 (photograph of auctioned land containing endorsements inaccurately showing lateral extent and characteristics of the property).

6 Under the Sale of Goods Act 1979, where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description: see the Sale of Goods Act 1979 s 13(1) (amended by the Sale and Supply of Goods Act 1994 s 7, Sch 2 para 5(4)(a)); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 72 et seq. A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer: Sale of Goods Act 1979 s 13(3). As to the sale of goods by description see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 72 et seq.

7 *Museprime Properties Ltd v Adhill Properties Ltd* (1990) 61 P & CR 111, [1990] 2 EGLR 196. See *Boyster v Thomson* [1995] 2 AC 628, [1995] 3 All ER 135, HL (an undisclosed principal was liable to a buyer for breach of an implied term under the Sale of Goods Act 1979 s 14(1)-(4) (as amended) (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 82)).

8 See paras 259-260 post.

UPDATE

215-217 Exercise of skill and knowledge ... Duties in respect of goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(3) AUCTIONEER'S DUTIES TO VENDOR/(i) General Duties/217. Duties in respect of goods.

217. Duties in respect of goods.

Since the auctioneer¹ is a bailee for reward, he must exercise ordinary care and diligence in keeping the goods entrusted to him². He has a possession coupled with an interest in goods which he is employed to sell, and not a bare custody³, and is liable for any loss or damage which may occur through his default or negligence⁴. If he has contracted to store goods as a bailee he is in breach of contract if he arranges for someone else to take possession of them, as the contract is one of which his personal care is of the essence⁵. If he has undertaken to insure goods which he is employed to sell he must give notice to his principal if, for any reason, he is unable to effect the insurance⁶.

In the absence of authority from the vendor, it is the duty of the auctioneer not to part with possession of the goods until the purchaser has paid the price. If the auctioneer does so and the purchaser fails to pay, the auctioneer will be liable to the vendor for the amount⁷.

Except where his right of lien⁸ exists, an auctioneer must redeliver goods to the vendor on demand, either before sale if the authority to sell is revoked, or after sale if the goods are unsold. Like other bailees, he is estopped⁹ from setting up the title of a third person against the bailor, unless the bailment is determined by what is equivalent to an eviction by title paramount, and the auctioneer defends upon the right and title and by the authority of such third person¹⁰. Even with such authority he cannot set up the *jus tertii* if he was aware of the adverse claim at the time when he accepted his employment¹¹.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Maltby v Christie* (1795) 1 Esp 340. The auctioneer may contract out of his liability as bailee and otherwise: *Spriggs v Sotheby Parke Bernet & Co Ltd* [1986] 1 Lloyd's Rep 487, CA (a pre-Unfair Contract Terms Act 1977 case where the exclusion clause was upheld). As to care and diligence of bailees see **BAILMENT**.

3 *Williams v Millington* (1788) 1 Hy Bl 81 at 85; *Woolfe v Horne* (1877) 2 QBD 355.

4 *Lilley v Doubleday* (1881) 7 QBD 510; *McMahon v Field* (1881) 7 QBD 591, CA.

5 *Edwards v Newland & Co (E Burchett Ltd, third party)* [1950] 2 KB 534, [1950] 1 All ER 1072, CA (applying *British Waggon Co and Parkgate Waggon Co v Lea & Co* (1880) 5 QBD 149, DC).

6 *Callander v Oelrichs* (1838) 5 Bing NC 58.

7 *Brown v Staton* (1816) 2 Chit 353. See para 215 ante.

8 As to auctioneers' lien see para 224 post.

9 As to estoppel see **ESTOPPEL** vol 16(2) (Reissue) para 1043 et seq.

10 *Biddle v Bond* (1865) 6 B & S 225; *Thorne v Tilbury* (1858) 3 H & N 534. See also **BAILMENT**. Whereas the limitations on the right to plead the *jus tertii* were abolished by the Torts (Interference with Goods) Act 1977 s 8 (see **TORT** vol 45(2) (Reissue) PARA 644), it is questionable whether the auctioneer is thereby enabled to resist claims by vendors to return the property or their proceeds of sale. A claim for wrongful interference is one to which the provisions of the Torts (Interference with Goods) Act 1977 apply: see s 1. A vendor seeking the return of his property or their proceeds could invariably claim under the terms of the contract of agency, and that appears to be outside the Torts (Interference with Goods) Act 1977. As to the scope of the Torts (Interference with Goods) Act 1977 see **TORT** vol 45(2) (Reissue) PARA 545.

11 *Re Sadler, ex p Davies* (1881) 19 ChD 86, CA.

UPDATE

215-217 Exercise of skill and knowledge ... Duties in respect of goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(3) AUCTIONEER'S DUTIES TO VENDOR/ (ii) Fiduciary Duties/218. Fiduciary duties owed to the vendor.

(ii) Fiduciary Duties

218. Fiduciary duties owed to the vendor.

There are duties owed to the vendor which arise out of the fiduciary relationship inherent in the agency¹: duties which are imposed so that there cannot be a position such that the auctioneer's² duty to the vendor and his own interests conflict. These are: (1) bidding on behalf of the purchaser³; (2) purchasing the vendor's property⁴; (3) obtaining a secret profit⁵; and (4) the duty to account⁶.

- 1 As to agency of auctioneers see para 206 ante.
- 2 For the meaning of 'auctioneer' see para 201 ante.
- 3 See para 219 post.
- 4 See para 220 post.
- 5 See para 221 post.
- 6 See para 222 post.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(3) AUCTIONEER'S DUTIES TO VENDOR/ (ii) Fiduciary Duties/219. Bidding on behalf of the purchaser.

219. Bidding on behalf of the purchaser.

Accepting commission bids on behalf of the purchaser creates an obvious potential conflict of interest¹ since the auctioneer² is then acting for two parties whose interests are antithetical. Most auctioneers do accept commissions to bid for potential purchasers and this will be unobjectionable only if the consent, actual or tacit, of the vendor is obtained³. This is usually done by making it clear in the consignment conditions that the auctioneer is willing to accept commissions for prospective buyers.

1 *Fullwood v Hurley* [1928] 1 KB 498, CA: 'If and so long as the agent is the agent of one party he cannot engage to become the agent of another ...'. Cf *Bexwell v Christie* (1776) 1 Cowp 395, where obiter the contrary was suggested. See *Fordham v Christie, Manson & Woods Ltd* (1977) 121 Sol Jo 529, 244 Estates Gazette 213 at 215 per May J.

2 For the meaning of 'auctioneer' see para 201 ante.

3 *Fullwood v Hurley* [1928] 1 KB 498, CA.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(3) AUCTIONEER'S DUTIES TO VENDOR/ (ii) Fiduciary Duties/220. Purchase by auctioneer.

220. Purchase by auctioneer.

A purchase by the auctioneer¹ himself without the vendor's consent is voidable, and will be set aside at the instance of the vendor, even after a long lapse of time, unless there is evidence that the vendor consented to the purchase after disclosure of all material facts known to the auctioneer². It is not enough to put the vendor on inquiry, the auctioneer must make a full disclosure of all material facts³. If he purchases without such disclosure he becomes a trustee of the property for his principal and is strictly accountable as such⁴. The burden of proof that there was full disclosure and that the vendor acquiesced in the sale lies on the auctioneer⁵.

Even after such full disclosure, the auctioneer will not, however, be entitled to commission on the sale unless the principal has expressly agreed to pay commission in the changed circumstances⁶. The presumption is that the auctioneer has ceased to be an agent⁷ and has become a contracting principal. The same applies if he has only a part interest in the purchase, for example, if he is one of a syndicate or if he is a shareholder in a purchasing company⁸. The embargo on the auctioneer buying his principal's property ceases once the auctioneer's agency is terminated⁹.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Oliver v Court* (1820) 8 Price 127; *Salomons v Pender* (1865) 3 H & C 639. See *Ex p Lacey* (1802) 6 Ves 625; *Sanderson v Walker* (1807) 13 Ves 601; and *Downes v Grazebrook* (1817) 3 Mer 200. As to voidable contracts see **CONTRACT** vol 9(1) (Reissue) para 607.

3 *Dunne v English* (1874) LR 18 Eq 524; *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339, CA; *Oliver v Court* (1820) 8 Price 127; *Baskett v Cafe* (1851) 4 De G & Sm 388; *Lees v Nuttall* (1834) 2 My & K 819; *Whitcomb v Minchin* (1820) 5 Madd 91.

4 *Lees v Nuttall* (1834) 2 My & K 819.

5 *Wentworth v Lloyd* (1863) 32 Beav 467.

6 *Hocker v Waller* (1924) 29 Com Cas 296; *Great Luxembourg Rly Co v Magnay (No 2)* (1858) 25 Beav 586; *McPherson v Watt* (1877) 3 App Cas 254, HL; *Salomons v Pender* (1865) 3 H & C 639; *Lees v Nuttall* (1834) 2 My & K 819.

7 As to agency of auctioneers see para 206 ante.

8 *Wentworth v Lloyd* (1863) 32 Beav 467; *Salomons v Pender* (1865) 3 H & C 639.

9 *Young v Hill, Ford and Newton* (1883) 2 NZLR 62; cf *Oliver v Court* (1820) 8 Price 127 (agency continued after auctioneer left the rostrum).

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(3) AUCTIONEER'S DUTIES TO VENDOR/ (ii) Fiduciary Duties/221. Obtaining a secret profit.

221. Obtaining a secret profit.

It is an inexorable rule drawn from the law of trusts that an auctioneer¹ must not use his position to gain a profit from the transaction from a third party². Any such profit must be passed to the vendor unless he consents to the profit being made³.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Hippisley v Knee Bros* [1905] 1 KB 1. As to the rule that trustees must not profit from their trust see **EQUITY** vol 16(2) (Reissue) para 858; **TRUSTS** vol 48 (2007 Reissue) para 926 et seq.

3 *Hippisley v Knee Bros* [1905] 1 KB 1. It is thought that this will only apply if, as is nowadays unusual, the auctioneer invoices the vendor separately for such items. See **AGENCY** vol 1 (2008) PARA 91.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(3) AUCTIONEER'S DUTIES TO VENDOR/ (ii) Fiduciary Duties/222. Duty to account.

222. Duty to account.

Whilst there is no general duty to obtain the purchase money¹, an auctioneer² must account for any money received by him on the vendor's behalf, and be ready to pay it over to him³. If he fails to keep proper accounts or fails to pay or transfer money or property to his principal he will be liable to a claim for an account⁴. The auctioneer is in a fiduciary position in respect of such money⁵, and an order to pay can be made against him as trustee, which, if disobeyed, renders him liable to committal for contempt⁶.

In general, payment should be made to the vendor, and not to his solicitors except by his express directions⁷. The relevance of the fact that the duty arises out of the fiduciary relationship between the auctioneer and his vendor client is that the vendor can trace the property in the hands of his agent in priority to the latter's ordinary trade and other creditors⁸.

1 *Fordham v Christie, Manson & Woods Ltd* (1977) 121 Sol Jo 529, 244 Estates Gazette 213. See para 209 ante.

2 For the meaning of 'auctioneer' see para 201 ante.

3 As to accountability of trustees for profit see **TRUSTS** vol 48 (2007 Reissue) para 928.

4 *le* under CPR Pt 25: see **CIVIL PROCEDURE** vol 11 (2009) PARA 315 et seq.

5 *Re Cotton, ex p Cooke* (1913) 108 LT 310, CA.

6 *Crowther v Elgood* (1887) 34 ChD 691, CA. See, however, *Henry v Hammond* [1913] 2 KB 515, where *Crowther v Elgood* supra does not appear to have been cited. As to civil contempt of court see **CONTEMPT OF COURT** vol 9(1) (Reissue) para 458 et seq.

7 *Brown v Farebrother* (1888) 58 LJ Ch 3. As to payments in sales under court direction see **SALE OF LAND** vol 42 (Reissue) para 133 et seq.

8 *Re Cotton, ex p Cooke* (1913) 108 LT 310, CA. Contrast where the auctioneer sells as principal: *Murphy v Jonathon Howlett (a firm)* (1960) 176 Estates Gazette 311. As to following and tracing trust property see **TRUSTS** vol 48 (2007 Reissue) para 1134.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(4) AUCTIONEER'S RIGHTS AGAINST VENDOR/223. Remuneration.

(4) AUCTIONEER'S RIGHTS AGAINST VENDOR

223. Remuneration.

The remuneration payable to an auctioneer¹ by a private vendor may be fixed by express agreement as to both its amount and the events on which it is to be paid².

In order to found a legal claim for commission or other remuneration there must be a contractual relationship³. The contract on which the relationship is based may be implied from the circumstances or may arise from custom or usage⁴. Where a valid claim to remuneration arises but the amount has not been agreed, the auctioneer will be entitled to a fair and reasonable amount⁵.

Where a letter is written to the principal setting out the terms on which remuneration is payable and the principal does not dissent from them, he may be taken to have assented to them⁶. A failure to dissent, however, will not by itself create a contract in contradistinction to incorporating terms into an existing mandate⁷.

In most instances where the services of the auctioneer have been fully performed a customary rate of payment will be treated as the measure of a reasonable amount⁸.

The scale of payments to auctioneers is fixed by law in the case of a sale under a distress⁹, sales under the Insolvency Act 1986¹⁰, sales by the sheriff under a writ of fieri facias¹¹ and in the case of a sale of land under the directions of the High Court¹².

Before commission is payable, the auctioneer has to show that the events upon the happening of which he has acquired a vested right to commission have happened¹³. What these events are will vary from case to case¹⁴.

The auctioneer may be entitled to commission on a sale to a purchaser introduced by the auctioneer even where no sale by auction¹⁵ has been actually effected, if the terms of the contract so stipulate¹⁶. The auctioneer may be entitled to commission on a sale before the date of the auction where the purchaser is found by his client, the vendor, but not if the sale is effected by some third party with the right to sell¹⁷.

An auctioneer who is also a trustee cannot make a profit out of the execution of the trust, unless authorised by the terms of the trust to do so, and therefore, in the absence of such authorisation, cannot in general claim remuneration for the sale of trust property of which either he or his partner is trustee¹⁸.

The right to claim commission may be lost by the auctioneer's negligence¹⁹ or misconduct²⁰.

There is no room for any implied term that the vendor will not revoke his auctioneer's authority to sell and thus prevent the commission being earned²¹, but if the vendor has unjustifiably prevented its being earned by breaking his contract with the purchaser the court will imply such a term²². If the justifiable revocation prevents the auctioneer from bringing about the event upon which commission is payable, none is recoverable, but a reasonable sum may be. It has been held that a quantum meruit claim can be maintained²³, but this contradicts earlier authority equating the position of estate agents and auctioneers²⁴, which is to be preferred. There seems to be nothing, however, to prevent the auctioneer from making express contractual provision for situations where he is prevented from earning his commission.

The rationale against the auctioneer being paid commission or a reasonable sum, in the absence of express provision where he has not brought about the event on which it is to be payable does not apply to expenses paid out, and these are recoverable²⁵.

If two auctioneers claim commission in respect of the sale of the same property, the vendor cannot interplead unless the claims are adverse, that is, unless they are claims to the same money²⁶.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Re Page (No 3)* (1863) 32 Beav 487; *Beningfield v Kynaston* (1887) 3 TLR 279, CA; *Peacock v Freeman* (1888) 4 TLR 541, CA. For general rules and construction of contracts as to the payment of commission agency see **AGENCY** vol 1 (2008) PARA 101 et seq.

3 *Toulmin v Millar* as reported in (1887) 58 LT 96, HL, per Lord Watson.

4 As to implied contracts see **CONTRACT** vol 9(1) (Reissue) para 618.

5 *Manson v Baillie* (1855) 2 Macq 80; *Miller v Beal* (1879) 27 WR 403.

6 *John E Trinder & Partners v Haggis* [1951] WN 416, CA, Denning LJ dissenting.

7 *Way and Waller Ltd v Ryde* [1944] 1 All ER 9, CA.

8 Auctioneers today tend to charge a flat percentage of the sale price.

9 See the Law of Distress Amendment Act 1888 s 8(2); the Distress for Rent Rules 1988, SI 1988/2050, rr 10, 11, App 1 (all amended by SI 1999/2360); and **DISTRESS** vol 13 (2007 Reissue) para 1058.

10 See the Insolvency Act 1986; the Insolvency Rules 1986, SI 1986/1925 (amended by SI 1987/1919; SI 1989/397; SI 1991/495; SI 1993/602; SI 1995/586; SI 1998/1129; SI 1999/359; SI 1999/1022; SI 2001/763; and SI 2001/1149); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**.

11 See the Sheriffs Act 1887 s 20(2) (amended by the Statute Law Revision Act 1908); and the Order Fixing the Fees to be taken by Sheriffs or Sheriff's Officers Concerned in the Execution of Writs of Fieri Facias 1920, SR & O 1920/1250 (amended by SI 1956/502; SI 1956/2081; SI 1962/2417; SI 1971/808; SI 1982/89; and SI 1988/1384).

12 See CPR 40.16; *Practice Direction--1. Court's Powers in Relation to Land* PD 40D; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1215-1216. Where the court has ordered the sale of land under CPR 40.16, auctioneers' and estate agents' charges may, unless the court orders otherwise, include commission, fees for valuation of the land, charges for advertising the land and other expenses and disbursements, but not charges for surveys: *Practice Direction--1. Court's Powers in Relation to Land* PD 40D para 5.1(1). The court's authorisation is required for charges relating to surveys: para 5.1(2). If the total amount of the auctioneer's and estate agent's charges authorised under para 5.1(1) does not exceed 2.5% of the sale price, and does not exceed the rate of commission that that agent would normally charge on a sole agency basis, the charges may, unless the court orders otherwise, be met by deduction of the amount of the charges from the proceeds of sale without the need for any further authorisation from the court: para 5.2. However, if a charge made by an auctioneer or estate agent (whether in respect of fees or expenses or both) is not authorised under para 5.1(1), if the total amount of the charges so authorised exceeds the limits set out in para 5.2, if the land is sold in lots or by valuation or if the sale is of investment property, business property or farm property, an application must be made to the court for approval of the fees and expenses to be allowed: para 5.3. An application under para 5.3 may be made by any party or, if he is not a party, by the person having conduct of the sale, and may be made either before or after the sale has taken place: para 5.4.

13 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL (an estate agency case). Contra if he has a sole agency: *Gross Fine and Krieger Chalfen v Gaynor* (1974) 233 Estates Gazette 1015.

14 See *Peacock v Freeman* (1888) 4 TLR 541, CA (no commission payable where land knocked down to a purchaser but rescinded by the vendor in accordance with the conditions of sale, commission being payable if the property was 'sold'); and *Skinner v Andrews and Hall* (1910) 26 TLR 340, CA (commission payable in similar circumstances, the contract providing for commission to be payable on a 'sale ... under the hammer').

15 For the meaning of 'auction' see para 201 ante.

16 *Green v Bartlett* (1863) 14 CBNS 681. See also *Bayley v Chadwick* (1878) 39 LT 429, HL; and *Clark v Smythies* (1860) 2 F & F 83. The question whether the sale is the result of the auctioneer's intervention is in each case a question of fact: see *Lumley v Nicholson* (1886) 34 WR 716.

17 *John Meacock & Co v Abrahams (Loescher, third party)* [1956] 3 All ER 660, [1956] 1 WLR 1463, CA (mortgagors, the vendor client being the mortgagee).

18 *Matthison v Clarke* (1854) 3 Drew 3 (where the auctioneer was merely a mortgagee with a power of sale). See *Salomons v Pender* (1865) 3 H & C 639; *Broad v Selfe* (1863) 2 New Rep 541; and *Kirkman v Booth* (1848) 11 Beav 273. As to the inability of trustees to charge for services see **TRUSTS** vol 48 (2007 Reissue) para 930. It is unlikely that an auctioneer will be able to bring himself within the provisions relating to the remuneration of professional trustees contained in the Trustee Act 2000: see **TRUSTS** vol 48 (2007 Reissue) paras 931-932.

19 *Denew v Daverell* (1813) 3 Camp 451; *Duncan v Blundell* (1820) 3 Stark 6; *Jones v Nanney* (1824) 13 Price 76.

20 *White v Chapman* (1815) 1 Stark 113. As to loss of remuneration through misconduct see further **AGENCY** vol 1 (2008) PARA 110.

21 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, [1941] 1 All ER 33, HL.

22 *Alpha Trading Ltd v Dunshaw-Patten Ltd* [1981] QB 290, [1981] 1 All ER 482, CA.

23 *Frank Swain (a firm) v Whitfield Corpn Ltd* (1962) 183 Estates Gazette 479, CA.

24 *John Meacock & Co v Abrahams (Loescher, third party)* [1956] 3 All ER 660, [1956] 1 WLR 1463, CA.

25 *Chinnock v Sainsbury* (1860) 30 LJ Ch 409 per Romilly MR but only as reported in (1860) 3 LT at 259. See similar dicta in *John Meacock & Co v Abrahams (Loescher, third party)* [1956] 3 All ER 660 at 663, [1956] 1 WLR 1463 at 1467, CA, per Lord Denning LJ.

26 *Greatorex v Shackle* [1895] 2 QB 249 at 252 per Wright J. As to interpleader see **CIVIL PROCEDURE** vol 12 (2009) PARA 1585 et seq.

UPDATE

223 Remuneration

NOTE 9--SI 1988/2050 App 1 amended: SI 2003/1858.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(4) AUCTIONEER'S RIGHTS AGAINST VENDOR/224. Lien.

224. Lien.

By the custom of their business, auctioneers¹ have a lien² on goods entrusted to them for sale and on the deposit and purchase money for their charges and remuneration³. They also have a lien on documents of title to land. The lien not only entitles the auctioneer to retain the goods against claims by the principal vendor, but also allows him to resist claims to the goods made by the purchaser in support of his rights against the vendor, and he will not in that situation be susceptible to a claim in tort for wrongful interference with goods⁴.

This lien attaches to goods whether they are sold at the auctioneer's premises or at those of the vendor⁵. It is a charge on the proceeds of sale in priority to any assignment by the vendor, and the auctioneer cannot be compelled to marshal the proceeds of several sales in order to give effect to the rights of an assignee of the purchase money of certain of the sales⁶. The lien will be lost if the auctioneer waives it⁷, and he may be estopped from establishing it by having earlier denied the vendor's title⁸.

1 For the meaning of 'auctioneer' see para 201 ante.

2 As to agents' liens see **AGENCY** vol 1 (2008) PARA 114 et seq. As to lien generally see **LIEN**.

3 *Williams v Millington* (1788) 1 Hy Bl 81. However, see *Skinner v Trustee of the Property of Reed (Bankrupt)* [1967] Ch 1194, [1967] 2 All ER 1286 (no lien on deposit received by auctioneer as stakeholder where outstanding incumbrances exceed the amount of the purchase price or the balance of it, as the property never became that of the vendor); and para 250 post.

4 *Lane v Tewson* (1841) 12 Ad & El 116n. See also *Marcq v Christie Manson & Woods Ltd (t/a Christie's)* [2002] EWHC 2148 (QB), [2002] 4 All ER 1005. As to wrongful interference with goods see **TORT** vol 45(2) (Reissue) PARA 542 et seq.

5 *Williams v Millington* (1788) 1 Hy Bl 81; *Robinson v Rutter* (1855) 4 E & B 954.

6 *Webb v Smith* (1885) 30 ChD 192, CA.

7 *Scarfe v Morgan* (1838) 4 M & W 270.

8 *Dirks v Richards* (1842) 4 Man & G 574. It is thought that merely accepting alternative security will not amount to abandonment of the lien.

UPDATE

224 Lien

NOTE 4--*Marcq*, cited, affirmed: [2003] EWCA Civ 731, [2003] All ER (D) 337 (May).

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(4) AUCTIONEER'S RIGHTS AGAINST VENDOR/225. Indemnity.

225. Indemnity.

The vendor is bound to indemnify the auctioneer¹ for any damages sustained by the auctioneer in the ordinary course of his employment as the natural consequence of the contract of agency² and, in the absence of any agreement to the contrary, for any expenses incurred³. Where an auctioneer is sued and claims an indemnity, he may serve a third party notice on his principal⁴.

The vendor's duty to indemnify the auctioneer extends to a case where property for sale has been received by an auctioneer in good faith from a principal who was not the true owner and the auctioneer has been held liable for conversion⁵. However, the indemnity does not extend to cases where the auctioneer has been sued and damages have been recovered from him for some act which is not a wrongful act done in pursuance of his employment, unless the auctioneer defends with the principal's express or implied authority⁶. The judgment against the auctioneer creates no estoppel against the principal unless he had such authority⁷. The auctioneer will not be entitled to an indemnity where he incurs a liability by virtue of a mistake of the law⁸ or where he has been negligent⁹.

1 *Williams v Lister & Co (Llewellyn Bros, third parties)* (1913) 109 LT 699, CA; *Adamson v Jarvis* (1827) 4 Bing 66. For the meaning of 'auctioneer' see para 201 ante. As to an agent's right of indemnity generally see **AGENCY** vol 1 (2008) PARAS 111-113.

2 As to agency of auctioneers see para 206 ante.

3 Among the expenses properly incurred is money paid to protect the goods from distress as long as they remain the vendor's property, but money paid after the sale and when the property in them has passed to the purchaser is not chargeable against the vendor: *Sweeting v Turner* (1871) LR 7 QB 310; *Chinnock v Sainsbury* (1860) 30 LJ Ch 409; *Brittain v Lloyd* (1845) 14 M & W 762.

4 See CPR Pt 20; and **CIVIL PROCEDURE** vol 11 (2009) PARA 618 et seq.

5 *Spurrier v Elderton* (1803) 5 Esp 1; *Adamson v Jarvis* (1827) 4 Bing 66. On a sale on behalf of the sheriff an auctioneer is not entitled to indemnity against the sheriff: *Farebrother v Ansley* (1808) 1 Camp 343.

6 *Halbronn v International Horse Agency and Exchange Ltd* [1903] 1 KB 270; *Frixione v Tagliaferro & Sons* (1856) 10 Moo PCC 175 at 200 (doubted in *Williams v Lister & Co (Llewellyn Bros, third parties)* (1913) 109 LT 699, CA). See *Tomlinson v Scottish Amalgamated Silks Ltd (Liquidators)* 1935 SC 1, HL.

7 *Halbronn v International Horse Agency and Exchange Ltd* [1903] 1 KB 270; *Frixione v Tagliaferro & Sons* (1856) 10 Moo PCC 175.

8 *Capp v Topham* (1805) 6 East 392 (failure to avoid auction duty being payable on abortive sale).

9 *Jones v Nanney* (1824) 13 Price 76.

UPDATE

225 Indemnity

NOTE 4--CPR Pt 20 substituted: SI 2005/3515.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(5) AUCTIONEER IN RELATION TO THIRD PERSONS/(i) Liabilities/226. Liability for conversion.

(5) AUCTIONEER IN RELATION TO THIRD PERSONS

(i) Liabilities

226. Liability for conversion.

A claim for conversion lies against an auctioneer¹ who, with or without knowledge of the true ownership of goods, has dealt with the property in and possession of those goods without the true owner's consent or authority², unless the case is governed by the Factors Act 1889³. The auctioneer's liability is strict and he is liable to the true owner even if he is completely ignorant of the want of title or the right to sell of the vendor-principal⁴.

A mere advertisement for sale without an actual sale does not constitute a conversion; nor does the return of unsold goods to the vendor⁵. Greater difficulty, however, surrounds situations where the auctioneer does not effect the sale itself but plays some role in bringing the vendor and purchaser together. If the auctioneer is in possession of the goods but the vendor and purchaser effect a private treaty sale, it has been suggested that no act of conversion has been committed by the auctioneer⁶. However, it has been held that where auctioneers had an elaborate provisional bid procedure designed to bring about a private treaty sale of a lot that had not been sold at auction⁷, they were liable in conversion and could not be said to be mere conduits⁸.

Normally the sale of goods not owned by the vendor-principal effected by the auctioneer will not vest title in the purchaser⁹. Even where it does by virtue of the recognised exceptions to the general principle¹⁰, this does not assist the auctioneer as the sale was not only intended to, but also had the effect of, depriving the owner of property.

It has been suggested that when goods are delivered to an auctioneer by a mercantile agent acting in the course of his ordinary business who is in possession of the goods with the true owner's consent, the auctioneer is not liable for dealing with the goods, provided the dealing is in good faith and without notice of the true owner's claim¹¹. However, that requires the delivery to the auctioneer to be treated as a 'disposition' and that this is so has been denied¹².

If the auctioneer has notice of the adverse claim of the true owner, he is thereafter liable for the value, not only of goods sold by him, but also of those unsold by him and returned to his principal¹³.

When the auctioneer's liability is established, the measure of damages is the true value of the goods, normally at the time when the judgment is given¹⁴, and not merely the sum realised at the auction¹⁵.

The auctioneer may also be liable for failing to deliver the goods up to the true owner who claims them, but he is entitled to make reasonable inquiries¹⁶. In appropriate cases he may interplead¹⁷.

There can, however, be no liability if the principal had title at the time of sale. This may involve a question of foreign law¹⁸. On the other hand, an auctioneer may find himself exposed to a conversion claim by virtue of the application of a foreign limitation period more generous to the claimant than corresponding English periods¹⁹.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Barker v Furlong* [1891] 2 Ch 172; *Consolidated Co v Curtis & Son* [1892] 1 QB 495; *Brown v Hickinbotham* (1881) 50 LJQB 426, CA; *Featherstonhaugh v Johnson* (1818) 8 Taunt 237; *Adamson v Jarvis* (1827) 4 Bing 66; *Cochrane v Rymill* (1879) 40 LT 744, CA; *Hardacre v Stewart* (1804) 5 Esp 103. See *Kuwait Airways Corp v Iraqi Airways Co* [2001] 1 All ER (Comm) 557, [2001] 3 WLR 1117, CA. As to conversion see **TORT** vol 45(2) (Reissue) PARA 548 et seq.

3 See *Shenstone & Co v Hilton* [1894] 2 QB 452; *Waddington & Sons v Neale & Sons* (1907) 96 LT 786. As to dispositions under the Factors Act 1889 see **AGENCY** vol 1 (2008) PARA 148.

4 *Union Transport Finance Ltd v British Car Auctions Ltd* [1978] 2 All ER 385, 246 Estates Gazette 131, CA.

5 *Marcq v Christie Manson & Woods Ltd (t/a Christie's)* [2002] EWHC 2148 (QB), [2002] 4 All ER 1005.

6 *Cochrane v Rymill* (1879) 40 LT 744, CA (obiter, where the auctioneer was in fact held liable, as he had dealt with the property by giving the vendor an advance on the proceeds of sale and had a lien on the goods). See other cases where auctioneers were held not liable in conversion as they acted as a mere conduit: *National Mercantile Bank v Rymill* (1881) 44 LT 767, CA (sale by private treaty before auction, auctioneer taking his commission and giving delivery order to purchaser); *Turner v Hockey* (1887) 56 LJQB 301 (mere communication of offer: see explanation given in *Consolidated Co v Curtis & Son* [1892] 1 QB 495 at 502-503 per Collins J); *Barker v Furlong* [1891] 2 Ch 172 (mere setting of price (obiter)). See the text and notes 7-8 infra.

7 For the meaning of 'auction' see para 201 ante.

8 *RH Willis & Son (a firm) v British Car Auctions Ltd* [1978] 2 All ER 392, [1978] 1 WLR 438, CA (casting doubt on *National Mercantile Bank v Rymill* (1881) 44 LT 767, CA; and *Turner v Hockey* (1887) 56 LJQB 301). See note 6 supra.

9 '*Nemo dat quod non habet*': see the Sale of Goods Act 1979 s 21(1); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 150 et seq.

10 See ibid ss 21-23, 25; and **SALE OF LAND** vol 42 (Reissue) para 150 et seq. The recognised exceptions used to include the rule of market overt, which was abolished by the Sale of Goods (Amendment) Act 1994 s 1 as from 3 January 1995. The rule provided that where goods, other than goods belonging to the Crown, were sold in market overt according to the usage of the market, the buyer acquired a good title to the goods, provided that he bought them in good faith and without any notice of any defect or want of title on the part of the seller. A purchaser after 3 January 1995 is not able to claim title by reason of a purchase in market overt, but a seller who claims to be the true owner by virtue of his purchase in market overt before 3 January 1995 will continue to be able to plead that exception, and an auctioneer acting for one who can rely on the exception is not guilty of conversion. As to the abolition of market overt see further **MARKETS, FAIRS AND STREET TRADING** vol 29(2) (Reissue) para 1026.

11 See *Shenstone & Co v Hilton* [1894] 2 QB 452. See also **AGENCY**.

12 *Waddington & Sons v Neale & Sons* (1907) 96 LT 786.

13 *Davis v Artingstall* (1880) 49 LJ Ch 609.

14 *Sachs v Miklos* [1948] 2 KB 23, [1948] 1 All ER 67, CA.

15 *Davis v Artingstall* (1880) 49 LJ Ch 609 at 610 per Fry J.

16 *Lee v Bayes and Robinson* (1856) 18 CB 599; *Turner v Ford* (1846) 15 M & W 212.

17 As to interpleader by auctioneers see para 232 post.

18 *Winkworth v Christie, Manson & Woods Ltd* [1980] Ch 496, [1980] 1 All ER 1121.

19 See *Gotha City v Sotheby's (No 2)* (1998) Times, 8 October.

UPDATE

226 Liability for conversion

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

NOTE 5--*Marcq*, cited, affirmed: [2003] EWCA Civ 731, [2003] All ER (D) 337 (May).

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(5) AUCTIONEER IN RELATION TO THIRD PERSONS/(i) Liabilities/227. Other duties to third parties.

227. Other duties to third parties.

An auctioneer¹ owes a general duty of care to third parties who attend auctions² and especially duties to ensure their safety whilst at the auction premises over which the auctioneer has control. This could include the vendor's premises³. He also may in appropriate circumstances be liable in nuisance⁴.

1 For the meaning of 'auctioneer' see para 201 ante.

2 See **NEGLIGENCE**. For the meaning of 'auction' see para 201 ante.

3 *Walker v Crabb* (1916) 33 TLR 119. *Kenworthy v Stephenson & Son, Thorp and Whittaker* [1997] CLY para 3766 (auctioneers admitted liability where a visitor to a horse auction was injured by a horse being tried out by a potential buyer).

4 *Benjamin v Storr* (1874) LR 9 CP 400. As to nuisance see generally **NUISANCE** vol 78 (2010) PARA 101.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(5) AUCTIONEER IN RELATION TO THIRD PERSONS/(i) Liabilities/228. Executorship de son tort.

228. Executorship de son tort.

If an auctioneer¹ intermeddles with the estate of a deceased person without the authority of a properly constituted executor, he may render himself liable as an executor de son tort².

¹ For the meaning of 'auctioneer' see para 201 ante.

² See *Nulty v Fagan* (1888) 22 LR Ir 604. As to executors de son tort see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) paras 53-62.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(5) AUCTIONEER IN RELATION TO THIRD PERSONS/(i) Liabilities/229. Sex discrimination and race relations.

229. Sex discrimination and race relations.

It is unlawful for a person to discriminate on the grounds of sex, colour, race or ethnic or racial origins in the provision of professional services or in the disposal of housing accommodation or business or other premises¹.

¹ See the Sex Discrimination Act 1975 s 29 (as amended); the Race Relations Act 1976 s 20; and **DISCRIMINATION** vol 13 (2007 Reissue) paras 382, 461.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(5) AUCTIONEER IN RELATION TO THIRD PERSONS/(ii) Rights/230. Right to possession of goods.

(ii) Rights

230. Right to possession of goods.

By virtue of his lien¹ and special property an auctioneer² can maintain a claim for trespass³ or conversion⁴ against persons wrongfully interfering with or converting goods⁵. He has, however, no such property in, or right of claim in respect of, unsevered fixtures because these are land and an auctioneer employed to sell such fixtures has only a right to detach and remove them and not, before such severance, possession of them⁶.

1 As to agents' liens see **AGENCY** vol 1 (2008) PARA 114 et seq.

2 For the meaning of 'auctioneer' see para 201 ante.

3 As to trespass to goods see **TORT** vol 45(2) (Reissue) PARAS 659-660.

4 As to conversion see **TORT** vol 45(2) (Reissue) PARA 548 et seq. As to the distinction between trespass and conversion see **TORT** vol 45(2) (Reissue) PARA 661.

5 *Williams v Millington* (1788) 1 Hy Bl 81 at 85 per Heath J; *Robinson v Rutter* (1855) 4 E & B 954 at 956. See also para 217 ante.

6 *Davis v Danks* (1849) 3 Exch 435.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(5) AUCTIONEER IN RELATION TO THIRD PERSONS/(ii) Rights/231. Privilege from distress.

231. Privilege from distress.

Goods delivered to an auctioneer¹ for sale are privileged from distress² whilst on the auctioneer's premises, as being chattels delivered to a person exercising a public trade to be dealt with in the way of his trade or employ³. The privilege attaches to the goods either at the auctioneer's ordinary place of business or on premises temporarily hired for the auction⁴, and even though the auctioneer's occupation of the premises is not lawful⁵. It also extends to goods in the yard of a house⁶. It does not, however, cover goods which are on the owner's premises, and such goods remain liable to distraint although they are the subject matter of a sale by auction⁷. The law is now largely governed by statute⁸.

1 For the meaning of 'auctioneer' see para 201 ante.

2 As to trade privileges from distress see **DISTRESS** vol 13 (2007 Reissue) para 932 et seq.

3 See *Adams v Grane and Osborne* (1833) 1 Cr & M 380 (privilege is granted for the benefit of trade).

4 For the meaning of 'auction' see para 201 ante.

5 *Brown v Arundell* (1850) 10 CB 54.

6 *Williams v Holmes* (1853) 8 Exch 861.

7 *Lyons v Elliott* (1876) 1 QBD 210.

8 See the Law of Distress Amendment Act 1908, which gives the owner of the goods suffering distress, not being interested in the premises where distraint is carried out, the right to serve notice of his interest in the goods: see **DISTRESS** vol 13 (2007 Reissue) para 951 et seq.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/1. THE AUCTIONEER/(5) AUCTIONEER IN RELATION TO THIRD PERSONS/(ii) Rights/232. Interpleader by auctioneer.

232. Interpleader by auctioneer.

Where adverse claims are made to goods or money in the hands of an auctioneer¹, the auctioneer may interplead², subject to the ordinary rules governing interpleader³. In order to interplead the auctioneer must be subject to a claim or expect to be sued in respect of the goods⁴. If that is not the case but a third party disputes the vendor's right to sell, the auctioneer will be advised not to put the lot up for sale without securing an express indemnity from the vendor.

1 For the meaning of 'auctioneer' see para 201 ante.

2 See CPR Sch 1 RSC Ord 17 r 1(1)(a). As to interpleader see **CIVIL PROCEDURE** vol 12 (2009) PARA 1585 et seq.

3 For the application to auctioneers of the ordinary rules as to the identity of the property claimed see *Wright v Freeman* (1879) 48 LJQB 276; *Hoggart v Cutts* (1841) 1 Cr & Ph 197. As to collusion see *Thompson v Wright* (1884) 13 QBD 632; *Ingham v Walker* (1887) 3 TLR 448, CA.

4 See CPR Sch 1 RSC Ord 17 r 1(1)(a).

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/233. Time and place of sale.

2. THE AUCTION SALE AND THE DEPOSIT

(1) CONDUCT OF THE AUCTION

233. Time and place of sale.

There are no special restrictions affecting the time and place when and where a sale by auction¹ may be held², and an auctioneer³ has the same right of admission to a public market to exercise his calling as have traders entering to sell their own goods⁴.

A sale by auction should not be held at any place in contravention of any person's legal rights, for example, in a house in respect of which restrictive covenants against sales by auction exist⁵, or under such circumstances as to constitute an infringement of market rights⁶. An injunction will not be granted to restrain the sale by auction on leasehold premises of furniture belonging to the house⁷.

Any place at which a public auction is held, even though a private house, is for the time being a 'place of public resort' for the purposes of the criminal law⁸.

In livestock sales there are special statutory controls relating to the premises⁹.

1 For the meaning of 'auction' see para 201 ante.

2 *Keith v Reid* (1870) LR 2 Sc & Div 39, HL. The restriction on sales on Sundays imposed by the Sunday Observance Act 1677 s 1, was repealed as obsolete by the Statute Law (Repeals) Act 1969 s 1, Schedule Pt IV. As to Sunday trading see **TRADE AND INDUSTRY** vol 97 (2010) PARA 908 et seq. See also *Phillips v Parnaby* [1934] 2 KB 299, DC; *Dolton, Bournes & Dolton Ltd v Osmond* [1955] 2 All ER 258, [1955] 1 WLR 621, CA.

3 For the meaning of 'auctioneer' see para 201 ante.

4 *London Corp'n v Lyons Son & Co (Fruit Brokers) Ltd* [1936] Ch 78, CA. See *Nicholls v Tavistock UDC* [1923] 2 Ch 18. As to the right to attend markets see **MARKETS, FAIRS AND STREET TRADING** vol 29(2) (Reissue) para 1024.

5 *Toleman v Portbury* (1872) LR 7 QB 344.

6 *Elwes v Payne* (1879) 12 ChD 468. See *Abergavenny Improvement Comrs v Straker* (1889) 42 ChD 83; and *Hailsham Cattle Market Co v Tolman* [1915] 2 Ch 1, CA. As to market rights see **MARKETS, FAIRS AND STREET TRADING** vol 29(2) (Reissue) para 1021 et seq.

7 *Reeves v Cattell* (1876) 24 WR 485. Cf *Moses v Taylor* (1862) 11 WR 81.

8 *Sewell v Taylor* (1859) 7 CBNS 160 (a case under the Vagrancy Act 1824).

9 See para 240 post.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/234. Postal and on-line auctions.

234. Postal and on-line auctions.

Auctions¹ have traditionally involved public participation by persons gathered together in a physical space². However, postal auctions are common in some trades, such as philately and the sale of memorabilia. Bids are made by returning a bidding form before a deadline, and may be sent not only by post³, but also in some cases by fax⁴ or e-mail. As bidders are unaware of the level of other bids being made, bids increase in increments, with the winning bid being one increment above the second highest bid⁵. The vendor or the purchaser or both may be charged a premium⁶. Catalogues or lists may be issued⁷, and lots may be subject to reserves⁸ or estimates⁹.

On-line auctions are becoming increasingly popular and can take several forms. They can take place in real time with participants participating over the internet. Alternatively, bids may be 'posted' over the internet with the hammer falling on the expiry of a specified time limit. Where the web site acts as an auctioneer¹⁰, the rules relating to traditional auctions will apply. Some web sites, however, claim to act only as a venue to bring vendors and purchasers together and do not involve themselves in the contract of sale, preferring to collect commission from the seller post-sale or in advance when the lots are listed¹¹.

1 For the meaning of 'auction' see para 201 ante.

2 As to place of auction see para 233 ante.

3 As to offer and acceptance see **CONTRACT** vol 9(1) (Reissue) para 631 et seq. As to contracts made at a distance and the operation of the postal rule see **CONTRACT** vol 9(1) (Reissue) para 676 et seq.

4 As to contracts made by instantaneous communications see **CONTRACT** vol 9(1) (Reissue) para 683.

5 As to bidding see para 244 post.

6 As to remuneration of auctioneers see para 223 ante.

7 As to the duty owed to the vendor to describe property accurately see para 216 ante. As to liability for misrepresentation see para 257 post. Where an auctioneer applies a false or misleading description to goods or land he is guilty of an offence: see paras 259-260 post.

8 As to sales below reserve prices see para 208 ante.

9 As to estimates see paras 259-260 post.

10 For the meaning of 'auctioneer' see para 201 ante.

11 Where such a sale is not an auction, the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, which are specifically excluded from application to auctions, may apply: see reg 5; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 673 et seq.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/235. Advertisement of auction.

235. Advertisement of auction.

The advertisement of an auction¹ is merely an intimation of an intention to sell, and therefore, in the absence of fraud, intending purchasers who attend an auction have no right of claim if the property is not put up for sale². Even when the property is put up, it may be withdrawn before the fall of the hammer³.

When, however, the advertisement amounts to a representation of fact that the auctioneer is authorised to sell, and this representation is fraudulent, persons incurring expense on the faith of it can sue the auctioneer in tort⁴.

1 For the meaning of 'auction' see para 201 ante.

2 *Harris v Nickerson* (1873) LR 8 QB 286.

3 *Fenwick v Macdonald, Fraser & Co* (1904) 6 F 850, Ct of Sess. As to withdrawal of property see para 249 post.

4 *Richardson v Silvester* (1873) LR 9 QB 34.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/236. Particulars and conditions of sale.

236. Particulars and conditions of sale.

It is customary for an auctioneer¹ to settle the particulars and conditions of sale² on sales of goods, but not on sales of real property³. When he undertakes to settle the conditions, he must do so with the skill and knowledge which may reasonably be expected of one who practises as an auctioneer⁴, and if he sells without imposing conditions which are usual and prudent for the vendor's protection, he may, even in the case of a sale of real property, be held liable for negligence at the suit of the vendor⁵.

It is necessary in order that the conditions of sale may be incorporated into the contract of sale that they be communicated to bidders, and this can be done by notice, for example by exhibition in the auction room⁶ or by reproduction in the auction catalogue. Such communication must take place before the conclusion of the contract⁷.

Most conditions affect the vendor, auctioneer and the purchaser, that is the highest bidder. Some, however, affect bidders generally⁸. If such conditions are to bind bidders generally they must do so by virtue of the court finding a collateral contract between the auctioneer and the bidders⁹.

Conditions of an exclusionary nature or those modifying or limiting the liability of the auctioneer or vendor are subject to statutory control¹⁰ whereby they may be rendered void¹¹ or subject to a test of reasonableness¹².

A number of conditions are implied by the Sale of Goods Act 1979¹³. In relation to auctions, those of widest application are the implied conditions of correspondence with description and satisfactory quality. Auction sales are sales by description and are therefore affected by the statutory provisions¹⁴. Descriptions, especially statements about provenance in fine art sales, are invariably subject to some form of express caveat or exclusion of liability in auction conditions. To be valid, these must satisfy the tests of reasonableness and fairness¹⁵. As regards satisfactory quality, the implied term only applies to sellers who sell in the course of a business¹⁶. Where, as is frequently the case, the auctioneer sells on behalf of a principal who is not selling in the course of a business the implied condition will still apply unless either the auctioneer takes steps to bring to the notice of the buyer the fact that the vendor is a private seller or the buyer knows that fact¹⁷.

1 For the meaning of 'auctioneer' see para 201 ante.

2 In *Couchman v Hill* [1947] KB 554 at 559, [1947] 1 All ER 103 at 105, CA, Scott LJ expressed the view that a printed condition that the vendor will take no responsibility for errors of description of things or animals specifically offered for sale on inspection is reasonable for visible defects, but not for qualities which are invisible, and he recommended the point for consideration by the auctioneers' associations. Cf *Druce & Co Ltd v Leveson* (1952) 102 L Jo 721 (where the purchaser was held to have assented to a printed condition to which attention was drawn by the auctioneer). Conditions of sale are now generally subject to the Unfair Contract Terms Act 1977 (see **CONTRACT** vol 9(1) (Reissue) para 790 et seq) and the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended) (see **CONTRACT**). See the text and note 10 infra. As to the sale of goods by auction see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 745 et seq; and as to the sale of land by auction see **SALE OF LAND** vol 42 (Reissue) paras 84-85.

3 *Pike v Wilson* (1854) 1 Jur NS 59.

4 See para 215 ante.

5 *Denew v Daverell* (1813) 3 Camp 451.

6 *Mesnard v Aldridge* (1801) 3 Esp 271; *Bywater v Richardson* (1834) 1 Ad & El 508. Cf *Torrance v Bolton* (1872) 8 Ch App 118 (property described in printed particulars; subsequent oral description not enough to show purchaser not misled). See *Scriven Bros & Co v Hindley & Co* [1913] 3 KB 564. As to the construction of a particular condition see *Robinson, Fisher and Harding v Behar* [1927] 1 KB 513 (where a condition that lots uncleared 'shall' be resold was held to be purely permissive).

7 *Dennant v Skinner and Collom* [1948] 2 KB 164, [1948] 2 All ER 29. As to the incorporation of written terms see **CONTRACT** vol 9(1) (Reissue) para 688 et seq.

8 Eg conditions relating to the conduct of the auction: control of bidding, withdrawal of bids, etc.

9 As found in *Shandel v Jacobs* 1949 (1) SA 320.

10 See the Unfair Contract Terms Act 1977 (see **CONTRACT** vol 9(1) (Reissue) para 790 et seq); and the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended) (see **CONTRACT**). The statutory provisions apply both to the conditions of sale affecting buyers and to the consignment conditions regulating the relationship between the auctioneer and his seller client.

11 See the Unfair Contract Terms Act 1977 s 6(1) (s 6(1), (2) amended by the Sale of Goods Act 1979 s 63, Sch 2 para 19); and **CONTRACT** vol 9(1) (Reissue) para 826; **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) paras 103, 450.

12 See the Unfair Contract Terms Act 1977 s 6(2) (as amended: see note 11 supra), s 6(3). As to the test of reasonableness see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) paras 104, 451.

As originally enacted, the Unfair Contract Terms Act 1977 provides that a sale by auction is not, in any circumstances, treated as a consumer sale for the purposes of the provisions relating to the exclusion of terms implied by the Sale of Goods Act 1979: see the Unfair Contract Terms Act 1977 s 12(2); and **CONTRACT** vol 9(1) (Reissue) para 832; **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 450. There is, however, no similar provision with regard to the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended): see **CONTRACT**. As from 31 March 2003, the Unfair Contract Terms Act 1977 is amended so as to provide that a sale by auction is not to be regarded as a consumer sale if the buyer: (1) is an individual and the goods are second hand goods sold at public auction at which individuals have the opportunity of attending the sale in person; (2) is not an individual and the goods are sold by auction or by competitive tender: see s 12(2) (substituted by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 14(1), (3)).

13 See the Sale of Goods Act 1979 s 12 (as amended) (implied terms about title), s 13 (as amended) (sale by description), s 14 (as amended) (implied terms about quality and fitness), s 15 (as amended) (sale by sample); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) paras 69 et seq, 467.

14 See *ibid* s 13 (amended by the Sale and Supply of Goods Act 1994 s 7, Sch 2 para 5(4)(a), (b)); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) paras 72-74.

15 See the Unfair Contract Terms Act 1977 s 11, Sch 2; the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, regs 5, 6.

16 See the Sale of Goods Act 1979 s 14(2) (substituted by the Sale and Supply of Goods Act 1994 s 1(1)); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 77 et seq.

17 See the Sale of Goods Act 1979 s 14(5); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 82. An undisclosed principal may additionally be exposed to liability to a buyer for breach of such an implied term: see *Boyer v Thomson* [1995] 2 AC 628, [1995] 3 All ER 135, HL.

UPDATE

236-237 Particulars and conditions of sale, Sale in lots

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/237. Sale in lots.

237. Sale in lots.

Where goods are put up for sale¹ by auction² in lots, each lot is prima facie deemed to be the subject of a separate contract of sale³. For the purposes of stamp duty⁴, the sale of each lot must be treated as a separate contract⁵.

1 'Sale' includes a bargain and sale as well as a sale and delivery: Sale of Goods Act 1979 s 61(1).

2 For the meaning of 'auction' see para 201 ante.

3 Sale of Goods Act 1979 s 57(1). 'Contract of sale' includes an agreement to sell as well as a sale: s 61(1). As to contracts of sale see further **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 27 et seq. As to the law of contract generally see **CONTRACT**.

4 As to stamp duty see **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

5 *Roots v Lord Dormer* (1832) 4 B & Ad 77; *Watling v Horwood* (1847) 12 Jur 48; *A-G v Cohen* [1937] 1 KB 478, [1937] 1 All ER 27, CA.

UPDATE

236-237 Particulars and conditions of sale, Sale in lots

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/238. Property subject to fixed agricultural charge.

238. Property subject to fixed agricultural charge.

An auctioneer¹ selling by auction² property subject to a fixed agricultural charge³ is not concerned to see that the statutory obligations governing the right to sell the property⁴ have been complied with notwithstanding that he may be aware of the existence of the charge⁵.

1 For the meaning of 'auctioneer' see para 201 ante.

2 For the meaning of 'auction' see para 201 ante.

3 As to fixed agricultural charges see the Agricultural Credits Act 1928 s 5(3); and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1328 et seq.

4 See *ibid* s 6(1), (2); and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1329.

5 See *ibid* s 6(3); and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1329.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/239. Sale of residential investment property by public auction.

239. Sale of residential investment property by public auction.

Special rights of first refusal are granted to certain tenants¹ such that a landlord² may not dispose of any estate or interest³ in qualifying premises⁴ unless he has served a notice⁵ on the tenants conferring a right of first refusal⁶. This regime was originally geared to private treaty sales, but subsequent legislation has provided an alternative procedure where the landlord wishes, as is commonly the case, to dispose of his residential investments by public auction⁷.

There are, in particular, special notice requirements where the landlord proposes to make the disposal by means of a sale at a public auction⁸. A landlord commits an offence if, without reasonable excuse, he makes a relevant disposal affecting any qualifying premises without having first complied with the notice requirements⁹, or in contravention of any prohibition or restriction imposed¹⁰ by the Landlord and Tenant Act 1987¹¹. Where a landlord has failed to serve notice or has failed to comply with the statutory requirements¹², the tenants have various rights¹³ against the purchaser¹⁴.

These provisions thus modify the general rule that a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer.

1 Any reference in the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended) to a tenant of a particular description is to be construed, in relation to any time when the interest under his tenancy has ceased to be vested in him, as a reference to the person who is for the time being the successor in title to that interest: s 20(3). As to qualifying tenants see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) para 1748.

2 As to landlords to whose premises the right of first refusal applies see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) para 1747.

3 See **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) para 1750.

4 I.e. any premises to which at the time of the disposal the Landlord and Tenant Act 1987 Pt I (as amended) applies: see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) para 1746.

5 I.e. in accordance with *ibid* s 5B (as added): see the text to note 8 *infra*; and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) para 1754.

6 As to the statutory requirements see *ibid* ss 6-10 (as substituted); and as to tenants' right of first refusal see further **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) para 1744 *et seq.*

7 See the Landlord and Tenant Act 1987, as amended by the Housing Act 1996; and the text and notes 8-14 *infra*. See further **LANDLORD AND TENANT**.

8 See the Landlord and Tenant Act 1987 s 5B (added by the Housing Act 1996 s 92(1), Sch 6 Pt I); and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) para 1754. For the meaning of 'auction' see para 201 *ante*.

9 I.e. under the Landlord and Tenant Act 1987 s 5B (as added): see the text to note 8 *supra*; and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) para 1754.

10 I.e. by *ibid* ss 6-10 (as substituted): see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) para 1758 *et seq.*

11 See *ibid* s 10A(1) (s 10A added by the Housing Act 1996 s 91(1)); and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) para 1782. A person guilty of an offence under the Landlord and Tenant Act 1987 s 10A (as added) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 10A(2) (as so added). As to failure to comply with tenants' right of first refusal see further s 10A(3)-(5) (as added); and **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) para 1782. 'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58);

and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Powers of Criminal Courts (Sentencing) Act 2000 s 128; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 144.

12 See note 6 *supra*.

13 le the right to information as to the terms of disposal (see the Landlord and Tenant Act 1987 s 11A (as added)); the right of qualifying tenants to take benefit of the contract (s 12A (as added)); the right of qualifying tenants to compel sale by the purchaser (s 12B (as added)); and the right of qualifying tenants to compel grant of new tenancy by superior landlord (s 12C (as added)): see **LANDLORD AND TENANT** vol 27(3) (2006 Reissue) para 1770 *et seq*.

14 See *ibid* s 11(1) (substituted by the Housing Act 1996 s 92(1), Sch 6 Pt II).

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/240. Sale of cattle in mart.

240. Sale of cattle in mart.

An auctioneer¹ must not, unless exempted by order² of the Secretary of State³, sell cattle⁴ at any mart where cattle are habitually or periodically sold, unless such facilities for weighing cattle are provided at the mart as are required in the case of sale of cattle at a market or fair to which the Markets and Fairs (Weighing of Cattle) Acts 1887 and 1891 apply⁵. Default in complying with these requirements renders the auctioneer or his employer, if he is employed by any person, liable on summary conviction to a fine⁶.

An auctioneer must not offer for sale in any market, fair or mart in or near which a weighing machine is provided⁷ any cattle⁸ fit for immediate slaughter unless they have been weighed on the machine and their weight as so ascertained is disclosed to intending purchasers at the time of the offer for sale, either by announcement made by the auctioneer or in some other manner calculated to bring it to their notice⁹. Any auctioneer who offers for sale any cattle in contravention of these statutory provisions is liable on summary conviction to a fine¹⁰. The Secretary of State¹¹ may by order¹² declare that these statutory provisions do not apply to any market, fair or mart¹³.

1 For the meaning of 'auctioneer' see para 201 ante.

2 Such orders, being local in nature, are not noted in this work.

3 The Markets and Fairs (Weighing of Cattle) Act 1887 refers to the Board of Agriculture, whose functions under s 4(1) (see the text and notes 1-2 supra, 4-5 infra) were transferred to the Ministry of Agriculture, Fisheries and Food by the Ministry of Agriculture and Fisheries Act 1919, and the Transfer of Functions (Ministry of Food) Order 1955, SI 1955/554. The functions of Minister of Agriculture, Fisheries and Food were transferred to the Secretary of State by the Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002, SI 2002/794. As to the Secretary of State see para 204 note 12 ante.

4 For these purposes, 'cattle' includes rams, ewes, wethers, lambs and swine: Markets and Fairs (Weighing of Cattle) Act 1887 s 3. As to the sale of cattle generally see **ANIMALS** vol 2 (2008) PARA 725 et seq; **MARKETS, FAIRS AND STREET TRADING** vol 29(2) (Reissue) para 1103 et seq.

5 See the Markets and Fairs (Weighing of Cattle) Act 1891 s 4(1). The power to exempt an auctioneer from the requirements of s 4(1) may be exercised where the circumstances are such as to render the enforcement of those requirements inexpedient: see the Markets and Fairs (Weighing of Cattle) Act 1926 s 2 (amended by the Statute Law (Repeals) Act 1975). Functions under the Markets and Fairs (Weighing of Cattle) Acts 1887 and 1926 may be delegated to the Meat and Livestock Commission: see the Agriculture Act 1967 s 4(1); and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1061. As to the weighing of cattle at markets see **MARKETS, FAIRS AND STREET TRADING** vol 29(2) (Reissue) para 1103 et seq.

6 Markets and Fairs (Weighing of Cattle) 1891 s 4(3). The reference in the text to a fine is a reference to a fine not exceeding level 2 on the standard scale, or in case of a continuing offence a fine not exceeding £10 for every day during which the offence continues: s 4(3) (amended by virtue of the Criminal Law Act 1977 s 31(6); and by virtue of the Criminal Justice Act 1982 ss 37, 46). As to the standard scale see para 239 note 11 ante.

7 It is provided in order to comply with the Markets and Fairs (Weighing of Cattle) Acts 1887 and 1891. A weighing machine provided under the Markets and Fairs (Weighing of Cattle) Acts 1887 and 1891 includes one provided under the Food Act 1984 s 57: see s 57(2).

8 For these purposes, 'cattle' means bulls, cows, oxen and heifers: Markets and Fairs (Weighing of Cattle) Act 1926 s 1(3).

9 Ibid s 1(1).

10 Ibid s 1(2). The reference in the text to a fine is a reference to a fine not exceeding level 1 on the standard scale for each head of cattle so offered for sale: s 1(2) (amended by virtue of the Criminal Law Act 1977 s 31(6); and by virtue of the Criminal Justice Act 1982 ss 37, 46).

11 See note 3 supra.

12 Such orders, being local in nature, are not noted in this work.

13 Markets and Fairs (Weighing of Cattle) Act 1926 s 1(4).

UPDATE

240 Sale of cattle in mart

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/241. Display of auctioneer's name and address.

241. Display of auctioneer's name and address.

Before beginning an auction¹ the auctioneer² must place or cause to be placed a ticket or board bearing his true and full first name and surname and his residence painted, printed or written thereon in large letters publicly visible and legible, and must place or cause to be placed a copy of the Auctions (Bidding Agreements) Acts 1927 and 1969 in some conspicuous part of the auction room and must keep them there during the whole time the auction is being held³. The penalty for a contravention of these statutory provisions on conviction is a fine⁴.

1 In addition to the statutory provisions regulating sales which are dealt with in this title, see the following other titles: **SALE OF LAND** vol 42 (Reissue) paras 133-136, for sales under CPR Pt 40 by order of the High Court; **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**, for sales on behalf of a trustee in bankruptcy; **DISTRESS** vol 13 (2007 Reissue) para 1044 et seq, for sales under distress; **CIVIL PROCEDURE** vol 12 (2009) PARA 1266, for sales by a sheriff; **COMPANIES** vol 15 (2009) PARA 1437 et seq, for sales in the winding up of companies; **CROWN PROPERTY**, for sales of Crown land; **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) para 450, for sales by personal representatives; **LICENSING AND GAMBLING** vol 67 (2008) PARA 214, for sales of goods deposited with innkeepers; **MORTGAGE** vol 77 (2010) PARA 440 et seq, for sales by mortgagees; **TRUSTS** vol 48 (2007 Reissue) para 1041 et seq, for sales of trust property. For the meaning of 'auction' see para 201 ante.

2 For the meaning of 'auctioneer' see para 201 ante.

3 See the Auctioneers Act 1845 s 7; the Auctions (Bidding Agreements) Act 1927 s 3; and the Auctions (Bidding Agreements) Act 1969 s 4.

4 See the Auctioneers Act 1845 s 7.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/242. Notification of reserve and of vendor's right to bid.

242. Notification of reserve and of vendor's right to bid.

A sale¹ of goods by auction² may be notified to be subject to a reserve or upset price³, and a right to bid may also be reserved expressly by or on behalf of the seller⁴. Where a sale by auction is not notified to be subject to a right to bid by or on behalf of the seller, it is not lawful for the seller to bid himself or to employ any person to bid at the sale⁵, or for the auctioneer⁶ knowingly to take any bid from the seller or any such person⁷. Such a sale may be treated as fraudulent by the buyer⁸.

The particulars or conditions of sale by auction of any land⁹ must state whether such land will be sold without reserve¹⁰, or subject to a reserve price or whether a right to bid is reserved¹¹. Where it is stated that land is to be sold without reserve, then it is not lawful for the seller to employ any person to bid at such sale, or for the auctioneer¹² to take knowingly any bidding from any such person¹³. Where any sale by auction of land is declared either in the particulars or conditions to be subject to a right for the seller to bid, it is lawful for the seller or any one person on his behalf to bid at such auction in such manner as he may think proper¹⁴. However, the conditions announced as governing the vendors reserve to bid must be strictly complied with¹⁵.

1 As to the meaning of 'sale' see para 237 note 1 ante.

2 For the meaning of 'auction' see para 201 ante.

3 It seems to have been formerly a rule in equity that where a sale of land was not notified to be without reserve one bidder might, even without express stipulation, be employed to prevent a sale at an undervalue: *Green v Baverstock* (1863) 14 CBNS 204 at 208 per Willes J; but see *Mortimer v Bell* (1865) 1 Ch App 10, CA, per Lord Cranworth LC.

4 See the Sale of Goods Act 1979 s 57(3). Where, in respect of a sale by auction, a right to bid is expressly reserved (but not otherwise) the seller or any one person on his behalf may bid at the auction: s 57(6). 'Seller' means a person who sells or agrees to sell goods: s 61(1).

5 See *Parnell v Tyler* (1833) 2 LJ Ch 195 (where it was held that even the employment by a third person of the vendor's solicitor's clerk invalidated the sale).

6 For the meaning of 'auctioneer' see para 201 ante.

7 Sale of Goods Act 1979 s 57(4). This statutory provision enacts the common law rule. The buyer has alternative remedies to sue for the tort or to avoid the contract. See generally *Crowder v Austin* (1826) 3 Bing 368 (highest bidder to be purchaser; seller whose servant pushed up bidding cannot recover price); *R v Marsh* (1831) 1 Cr & J 406 (bona fide bid for himself by seller's agent); *Thornett v Haines* (1846) 15 M & W 367 (sale without reserve; puffer employed without notice by vendor; buyer may recover deposit from auctioneer); *Green v Baverstock* (1863) 14 CBNS 204 (highest bidder to be purchaser; claim by auctioneer for non-clearance of goods). As to improper or fraudulent acts likely to prevent the goods put up from realising their fair value, such as damping the sale or 'knock out', see para 246 post.

8 Sale of Goods Act 1979 s 57(5).

9 'Land' means any interest in any messuages, lands, tenements, or hereditaments, of whatever tenure: Sale of Land by Auction Act 1867 s 3.

10 Any words may be used to render it clear, when such is the case, that the sale is without reserve: *Hills & Grant Ltd v Hodson* [1934] Ch 53. See also *Gilliat v Gilliat* (1869) LR 9 Eq 60 (although the dictum of Lord Romilly MR is not, it is suggested, reflective of the words used in the Sale of Land by Auction Act 1867).

11 Sale of Land by Auction Act 1867 s 5 (amended by the Statute Law Revision Act 1893). Notification of a reserve price is not in itself a reservation of the right to bid: *Gilliat v Gilliat* (1869) LR 9 Eq 60.

12 For these purposes, 'auctioneer' means any person selling by public auction any land, whether in lots or otherwise: Sale of Land by Auction Act 1867 s 3.

13 *Ibid* s 5 (as amended: see note 11 *supra*).

14 See *ibid* s 6; and *Thornett v Haines* (1846) 15 M & W 367.

15 *Parfitt v Jepson* (1877) 46 LJQB 529 (where the vendor reserved a right to bid once, and the sale was set aside because he bid three times).

UPDATE

242-245 Notification of reserve and of vendor's right to bid ... Mock auctions

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/243. Conditions of sale and oral modifications.

243. Conditions of sale and oral modifications.

Oral statements made by the auctioneer¹ may or may not form part of the contract of sale². Oral statements made to the purchaser by the auctioneer before the sale may amount to conditions or warranties³ which override the written conditions of sale⁴.

There used to be a distinction drawn between sales of goods and those of land as regards the effect of oral modifications of the conditions⁵. The difficulty in the case of land sales was that parol evidence could not be introduced to vary a written contract⁶. Now that there is no requirement of writing to render a contract for the sale of land by auction valid or enforceable⁷, that distinction may no longer be maintained. Oral statements may be used, where the contract is reduced to writing, to show that the written version was not what was actually agreed or that the contract is void for mistake⁸.

Oral corrections of misdescriptions in the particulars at the time of the sale may defeat the purchaser's right to enforce specific performance with compensation⁹.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Druce & Co Ltd v Leveson* (1952) 102 L Jo 721 (purchaser taken to have assented to conditions of sale forming part of contract where she heard auctioneer make oral reference to conditions of sale prior to the sale). Statements by the auctioneer may, however, amount to an offence under the Trade Descriptions Act 1968 or, in land sales, under the Property Misdescriptions Act 1991: see para 259 post; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 791 et seq. As to what statements are and are not part of the contract see **CONTRACT**; **SALE OF GOODS AND SUPPLY OF SERVICES**; **SALE OF LAND**.

3 The distinction between a condition, which gives a right to reject the thing sold and treat the contract as ended by the breach of the condition, and a warranty, which gives a right of claim for damages for breach, is considered in **CONTRACT** vol 9(1) (Reissue) para 993 et seq. A party entitled to the benefit of a condition may, in effect, turn it into a warranty by electing to claim damages: see *Wallis, Son and Wells v Pratt and Haynes* [1911] AC 394, HL.

4 *Couchman v Hill* [1947] KB 554, [1947] 1 All ER 103, CA (confirmatory description (heifer unserved) made by auctioneer and vendor before sale overrode stultifying condition in printed terms). See *Harling v Eddy* [1951] 2 KB 739, [1951] 2 All ER 212, CA (vendor's oral guarantee of soundness of heifer amounted to a condition of the contract). As to warranty on sale of animals see **ANIMALS** vol 2 (2008) PARA 725 et seq.

5 With goods, if there was no requirement of written evidence and no written contract, oral statements could modify the conditions of sale: *Eden v Blake* (1845) 13 M & W 614.

6 *Gunnis v Erhart* (1789) 1 Hy Bl 289; *Shelton v Livius* (1832) 2 Cr & J 411; *Ogilvie v Foljambe* (1817) 3 Mer 53; *Higginson v Clowes* (1805) 15 Ves 516; *Clowes v Higginson* (1813) 1 Ves & B 524; *Winch v Winchester* (1812) 1 Ves & B 375; *Anson v Towgood* (1820) 1 Jac & W 637. As to the parol evidence rule see **CONTRACT** vol 9(1) (Reissue) para 622.

7 See para 206 note 5 ante.

8 *Swaisland v Dearsley* (1861) 30 LJ Ch 652; *Winch v Winchester* (1812) 1 Ves & B 375; *Manser v Back* (1848) 6 Hare 443; *Re Hare and O'More's Contract* [1901] 1 Ch 93.

9 *Farebrother v Gibson* (1875) 1 De G & J 602. As to the remedy of specific performance see **SPECIFIC PERFORMANCE**.

UPDATE

242-245 Notification of reserve and of vendor's right to bid ... Mock auctions

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

243 Conditions of sale and oral modifications

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/244. Bidding.

244. Bidding.

The method of bidding and the amount of the bids are usually regulated by the conditions of sale¹. A sale² by auction³ is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner, and until the announcement is made any bidder may retract his bid⁴.

Fictitious bids made by a third person without the privity of the vendor or the auctioneer do not invalidate the sale, nor do they affect the vendor's right to specific performance⁵.

If an auctioneer pretends to accept bids which have not been made, a claim will lie against him for the deposit and interest upon it⁶. He might also be sued in fraud, and where fraud is alleged in a claim brought by the purchaser against the auctioneer and the vendor for rescission of the contract, the auctioneer cannot claim to be dismissed from the claim upon paying the deposit into court⁷. It remains to be decided whether the auctioneer 'taking bids out of the air' (a practice by no means unknown) is guilty of obtaining property by deception⁸.

If two or more persons take part in a mock auction⁹, by means of sham bidders and bidding, to induce persons to buy at excessive prices, they are guilty of a criminal conspiracy¹⁰.

1 Where the conditions provide that, in case any dispute arises respecting a bid, the auctioneer may determine the bid or the property may, at the vendor's option, either be put up again at the last undisputed bid or be withdrawn, there is a sufficient dispute for those conditions to apply if a bid is overlooked, even if the property is knocked down to the only bid seen by the auctioneer: see *Richards v Phillips* [1969] 1 Ch 39, [1968] 2 All ER 859, CA. See also *Frank R Thorold (Pty) Ltd v Estate Late Beit* 1996 (4) SA 705. For the meaning of 'auctioneer' see para 201 ante.

2 As to the meaning of 'sale' see para 237 note 1 ante.

3 For the meaning of 'auction' see para 201 ante.

4 Sale of Goods Act 1979 s 57(2); and see *Payne v Cave* (1789) 3 Term Rep 148. In an unconditional sale of specific goods the property in the goods passes on the fall of the hammer: see the Sale of Goods Act 1979 s 18 r 1; and *Dennant v Skinner and Collom* [1948] 2 KB 164, [1948] 2 All ER 29.

5 *Union Bank of London v Munster* (1887) 37 ChD 51. As to the remedy of specific performance see **SPECIFIC PERFORMANCE**.

6 *Heatley v Newton* (1881) 19 ChD 326, CA.

7 *Heatley v Newton* (1881) 19 ChD 326, CA.

8 Ie under the Theft Act 1968 s 15; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 310 et seq. All the main constituents of the offence appear to be committed but there may be problems relating to causation, especially where genuine bids intervene.

9 As to mock auctions see para 245 post.

10 *R v Lewis* (1869) 11 Cox CC 404. As to common law conspiracy see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) para 72 et seq.

UPDATE

242-245 Notification of reserve and of vendor's right to bid ... Mock auctions

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/245. Mock auctions.

245. Mock auctions.

It is an offence to promote or conduct, or to assist in the conduct of, a mock auction at which one or more lots consisting of or including one or more of the following articles are offered for sale¹: any plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament or any musical or scientific instrument or apparatus².

A sale of goods by way of competitive bidding³ is taken to be a mock auction if, but only if, during the course of the sale⁴:

- 1 (1) any such lot is sold to a person bidding for it⁵, and either it is sold to him at a price lower than the amount of his highest bid for that lot, or part of the price at which it is sold to him is repaid or credited to him or is stated⁶ to be so repaid or credited⁷; or
- 2 (2) the right to bid for any such lot is restricted, or is stated to be restricted, to persons who have bought or agreed to buy one or more articles⁸; or
- 3 (3) any articles are given away or offered as gifts⁹.

Any person guilty of such an offence is liable both on summary conviction and conviction on indictment to a fine¹⁰ or to imprisonment¹¹ or to both¹². Where an offence¹³ committed by a body corporate is proved to have been committed with the consent or connivance or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or any person purporting to act in such capacity, he, as well as the body corporate, is deemed to be guilty of that offence and is liable to be proceeded against and punished accordingly¹⁴.

1 Mock Auctions Act 1961 s 1(1).

2 Ibid s 3(2).

3 'Sale of goods by way of competitive bidding' means any sale of goods at which the persons present, or some of them, are invited to buy articles by way of competitive bidding, and 'competitive bidding' includes any mode of sale whereby prospective purchasers may be enabled to compete for the purchase of articles, whether by way of increasing bids or by the offer of articles to be bid for at successively decreasing prices or otherwise: *ibid* s 3(1). See *Lomas v Rydeheard* (1975) 119 Sol Jo 233, DC (seller calling out successively decreasing prices but not asking for offers until he reached his final price); *Clements v Rydeheard* [1978] 3 All ER 658, DC (offering boxes at fixed price and selecting purchasers who put up hands; purchasers of later lots similarly selected from amongst those who had purchased boxes). The competition need not relate to the price: *Allen v Simmons* [1978] 3 All ER 662, [1978] 1 WLR 879, DC. The words 'or otherwise' are not to be construed ejusdem generis with the preceding words: *R v Pollard* (1983) 148 JP 679, CA.

4 Mock Auctions Act 1961 s 1(3). Anything done in or about the place where a sale of goods by way of competitive bidding is held, if done in connection with the sale, is taken to be done during the course of the sale, whether it is done at the time when any articles are being sold or offered for sale by way of competitive bidding or before or after any such time: s 3(5).

5 Any reference to the sale of a lot to a person who has made a bid for it includes a reference to a purported sale thereof to a person stated to have bid for it, whether that person exists or not: *ibid* s 3(4).

6 'Stated', in relation to a sale of goods by way of competitive bidding, means stated by or on behalf of the person conducting the sale by an announcement made to the persons for the time being present at the sale: *ibid* s 3(3).

7 Ibid s 1(3)(a). However, a sale of goods is not taken to be a mock auction by virtue of s 1(3)(a), if it is proved that the reduction in price, or the repayment or credit, as the case may be, was on account of a defect discovered after the highest bid in question had been made, being a defect of which the person conducting the sale was unaware when that bid was made, or was on account of damage sustained after that bid was made: s 1(4). Any bid stated to have been made at a sale of goods by way of competitive bidding is conclusively presumed to have been made, and to have been a bid of the amount stated: s 3(4).

8 Ibid s 1(3)(b).

9 Ibid s 1(3)(c).

10 A person guilty of the offence is liable on summary conviction to a fine not exceeding the prescribed sum: ibid s 1(2)(a) (amended by virtue of the Magistrates' Courts Act 1980 s 32(7)). The 'prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1) (as substituted): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 141.

A person guilty of the offence is liable on indictment to an unlimited fine: see the Mock Auctions Act 1961 s 1(2) (b) (amended by virtue of the Criminal Law Act 1977 s 32(1)).

11 A person guilty of the offence is liable on summary conviction to imprisonment for a term not exceeding three months: Mock Auctions Act 1961 s 1(2)(a). A person guilty of the offence is liable on indictment for a term not exceeding two years: s 1(2)(b).

12 Ibid s 1(2). Subject to the provisions of the Interpretation Act 1978 s 18 (which relates to offences under two or more laws) (see **STATUTES** vol 44(1) (Reissue) para 1363), nothing in the Mock Auctions Act 1961 derogates from any right of claim or other remedy (whether civil or criminal) in proceedings instituted otherwise than under the Mock Auctions Act 1961: see s 3(6); Interpretation Act 1978 s 25(2).

13 Ie under the Mock Auctions Act 1961.

14 Ibid s 2.

UPDATE

242-245 Notification of reserve and of vendor's right to bid ... Mock auctions

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

245 Mock auctions

TEXT AND NOTES--Mock Auctions Act 1961 repealed: SI 2008/1277.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/246. Damping the sale and bidding agreements.

246. Damping the sale and bidding agreements.

Improper or fraudulent acts, which are likely to prevent the property put up from realising its fair value and to 'damp' the sale, will invalidate any purchase by persons guilty of or privy to such acts, so that the purchaser will be disentitled to specific performance and the auctioneer¹ will be justified in withdrawing the property². Furthermore, if a person maliciously makes false statements with the consequence that no sale results, the unsuccessful vendor can sue for malicious falsehood³.

At common law, an agreement between two or more persons not to bid against each other at an auction, even if amounting to what is popularly known as a 'knock-out', is not illegal, nor does it invalidate the sale⁴.

Where two or more persons agree not to bid against each other at an auction on the understanding that the successful purchaser will convey part of the property purchased to the other or others, equity gives relief if the purchaser fails to implement his promise⁵.

If any dealer⁶ agrees to give, or gives, or offers any gift or consideration to any other person as an inducement or reward for abstaining, or for having abstained, from bidding at a sale by auction either generally or for any particular lot, or if any person agrees to accept, or accepts, or attempts to obtain from any dealer any such gift or consideration, he is guilty of an offence⁷.

However, where a dealer has previously to an auction entered into an agreement in writing with one or more persons to purchase goods at the auction bona fide on a joint account and has before the goods were purchased at the auction deposited a copy of the agreement with the auctioneer, such an agreement is not treated as an agreement made in contravention of these statutory provisions⁸. A copy of the Auctions (Bidding Agreements) Act 1927 is one of the particulars required to be conspicuously displayed in the auction room⁹.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Twining v Morrice* (1788) 2 Bro CC 326; *Mason v Armitage* (1806) 13 Ves 25; *Fuller v Abrahams* (1821) 6 Moore CP 316.

3 *Mayer v Pluck* (1971) 223 Estates Gazette 33, 219. As to malicious falsehood see **LIBEL AND SLANDER** vol 28 (Reissue) para 274.

4 *Rawlings v General Trading Co* [1921] 1 KB 635, CA; *Cohen v Roche* [1927] 1 KB 169 (followed in *Harrop v Thompson* [1975] 2 All ER 94, [1975] 1 WLR 545).

5 *Pallant v Morgan* [1953] Ch 43, [1952] 2 All ER 951 (applying *Chattock v Muller* (1878) 8 ChD 177) (the successful purchaser buys for himself and the person who refrains from bidding jointly).

6 'Dealer' means a person who in the normal course of his business attends sales by auction for the purpose of purchasing goods with a view to reselling them: Auctions (Bidding Agreements) Act 1927 s 1(2). It is submitted that the Auctions (Bidding Agreements) Act 1927 does not apply to sales of land by auction. For the meaning of 'auction' see para 201 ante.

7 Ibid s 1(1). The penalty on summary conviction is a fine not exceeding the prescribed sum or a term of imprisonment not exceeding six months or both, or on conviction on indictment a fine or a term of imprisonment not exceeding two years or both: see s 1(1); the Auctions (Bidding Agreements) Act 1969 s 1(1) (amended by virtue of the Magistrates' Courts Act 1980 s 32(2)). As to the consequences of conviction of an offence under the Auctions (Bidding Agreements) Act 1927 see para 247 post. As to the prescribed sum see para 245 note 10 ante.

In England and Wales a prosecution for an offence under the Auctions (Bidding Agreements) Act 1927 s 1 must not be instituted without the consent of the Attorney General: s 1(3). As to the Attorney General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) para 529 et seq.

It was held before the passing of the Auctions (Bidding Agreements) Act 1969 (which introduced trial on indictment) that the offence, being the creation of statute and not an offence at common law, was triable only as provided by the Auctions (Bidding Agreements) Act 1927 and not on indictment, and that a count in an indictment which alleged a conspiracy to contravene the Auctions (Bidding Agreements) Act 1927 and, on the facts, amounted substantially to the statutory offence, was bad: *R v Barnett* [1951] 2 KB 425, [1951] 1 All ER 917, CCA. Since the offence is now triable on indictment it would seem that a charge of conspiracy to contravene the Auctions (Bidding Agreements) Act 1927 will now lie.

8 Ibid s 1(1) proviso.

9 See ibid s 3. As to the display of the Auctions (Bidding Agreements) Act 1927 see para 241 ante.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/247. Persons convicted under Auctions (Bidding Agreements) Act 1927 not to attend auctions.

247. Persons convicted under Auctions (Bidding Agreements) Act 1927 not to attend auctions.

On a conviction under the Auctions (Bidding Agreements) Act 1927¹, the court may order that the person so convicted or that person and any representative of him must not (without permission of the court) for a period from the date of such conviction, in the case of a summary conviction, of not more than one year, or in the case of a conviction on indictment, of not more than three years, enter upon any premises where goods intended for sale by auction² are on display or to attend or participate in any way in any sale by auction³. In any proceedings against a person in respect of a contravention of such an order consisting in the entry upon premises where goods intended for sale by auction were on display, it is a defence for him to prove that he did not know, and had no reason to suspect, that goods so intended were on display on the premises⁴. In any proceedings against a person in respect of a contravention of an order consisting in his having done something as the representative of another, it is a defence for him to prove that he did not know, and had no reason to suspect, that that other was the subject of an order⁵. A person is not guilty of an offence of contravening an order by reason only of his selling property by auction or causing it to be so sold⁶. A copy of the Auctions (Bidding Agreements) Act 1969 is one of the particulars to be conspicuously displayed in the auction room⁷.

1 In a conviction under the Auctions (Bidding Agreements) Act 1927 s 1(1): see para 246 ante.

2 For the meaning of 'auction' see para 201 ante.

3 Auctions (Bidding Agreements) Act 1969 s 2(1). In the event of a contravention of an order under s 2(1), the person who contravenes it (and, if he is the representative of another, that other also) is guilty of an offence and liable on summary conviction, to a fine not exceeding the prescribed sum; and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: s 2(2) (amended by virtue of the Magistrates' Courts Act 1980 s 32(2)). As to the prescribed sum see para 245 note 10 ante.

4 Auctions (Bidding Agreements) Act 1969 s 2(3).

5 Ibid s 2(3).

6 Ibid s 2(4).

7 See ibid s 4. As to the display of the Auctions (Bidding Agreements) Act 1969 see para 241 ante.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/248. Seller's right to avoid contract.

248. Seller's right to avoid contract.

Where goods are purchased at an auction¹ by a person who has entered into an agreement with another or others that the other or the others (or some of them) is to abstain from bidding for the goods (not being an agreement to purchase the goods bona fide on a joint account) and he or the other party, or one of the other parties, to the agreement is a dealer², the seller may avoid the contract under which the goods are purchased³. Where a contract is avoided by virtue of this provision, then, if the purchaser has obtained possession of the goods and restitution is not made, the persons who were parties to the agreement that one or some of them should abstain from bidding for the goods the subject of the contract are jointly and severally liable to make good to the seller the loss (if any) he sustained by reason of the operation of the agreement⁴.

1 For the meaning of 'auction' see para 201 ante.

2 For the meaning of 'dealer' see para 246 note 6 ante; definition applied by virtue of the Auctions (Bidding Agreements) Act 1969 s 3(5).

3 Ibid s 3(1). Section 3(1) applies to a contract made after 22 November 1969 (ie the commencement of the Auctions (Bidding Agreements) Act 1969: see s 5(2)) whether the agreement as to the abstention of a person or persons from bidding for the goods the subject of the contract was made before or after 22 November 1969: s 3(4).

4 Ibid s 3(2).

UPDATE

248 Seller's right to avoid contract

NOTE 3--1969 Act ss 3(4), 5(2) repealed: Statute Law (Repeals) Act 2004,

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(1) CONDUCT OF THE AUCTION/249. Withdrawal of property.

249. Withdrawal of property.

Before the completion of the sale the vendor may withdraw the property from the auction¹, provided that the sale is subject to a reserve which has not been reached². Where the sale is not subject to a reserve price and the property has been withdrawn during the auction, the vendor or the auctioneer³, if the latter has not disclosed his principal, is liable to an action for damages by the highest bidder on an implied undertaking that the sale shall be without reserve⁴.

1 For the meaning of 'auction' see para 201 ante.

2 *McManus v Fortescue* [1907] 2 KB 1, CA.

3 For the meaning of 'auctioneer' see para 201 ante.

4 See para 208 ante.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(2) THE DEPOSIT/250. Auctioneer as stakeholder.

(2) THE DEPOSIT

250. Auctioneer as stakeholder.

In the absence of special agreement¹, the auctioneer² receives the deposit as stakeholder for the vendor and the purchaser³, and it is his duty to hold it until the completion or rescission of the contract, and to pay it to the party ultimately entitled⁴.

If the auctioneer pays the money prematurely to either vendor or purchaser, and it turns out that the person paid was not entitled to it, the auctioneer is liable to make good the money to the party to the contract eventually held to be entitled⁵.

Where the purchaser is entitled to the return of the deposit, the auctioneer can set up the purchaser's right to the money in answer to any claim to it made by the vendor⁶.

An auctioneer may exercise his lien⁷ for his charges and disbursements against the deposit where the sale goes off by reason of the purchaser's default, or against the vendor, where the sale is completed and the deposit becomes part of the purchase price⁸. If, however, the incumbrances are greater than the purchase price or, where the vendor has become bankrupt, the balance of it, the auctioneer can be in no better position than the vendor, and cannot enforce his lien against the deposit⁹. Where the vendor charges the proceeds of sale to the purchaser subsequently to the sale the lien will take priority¹⁰.

The auctioneer should be ready to account for the deposit¹¹, but he is not liable to invest the deposit so as to be accountable for interest on it for the period during which he rightfully holds it as stakeholder, nor until demand for repayment has been made by some person entitled to receive it¹². If the auctioneer as stakeholder does invest the deposit there are dicta suggesting that he is entitled to keep the interest¹³.

1 In land sales the contract normally will have an express provision that the auctioneer is to hold the deposit as stakeholder: see the Standard Conditions of Sale (3rd Edn). As to the Standard Conditions of Sale see **SALE OF LAND** vol 42 (Reissue) para 1 et seq.

2 For the meaning of 'auctioneer' see para 201 ante.

3 *Harington v Hoggart* (1830) 1 B & Ad 577. See *Edwards v Hodding* (1814) 5 Taunt 815, where it was held that a solicitor who was also the auctioneer received the purchase money as auctioneer and not as solicitor and agent for the vendor. As to the receipt of a cheque by the auctioneer in payment of the deposit see paras 209 ante, 251 post.

4 *Gray v Gutteridge* (1828) 1 Man & Ry KB 614; *Yates v Farebrother* (1819) 4 Madd 239; *Edwards v Hodding* (1814) 5 Taunt 815; *Burrough v Skinner* (1770) 5 Burr 2639; *Furtado v Lumley* (1890) 54 JP 407; *Spurrier v Elderton* (1803) 5 Esp 1; *Spittle v Lavender* (1821) 2 Brod & Bing 452; *Berry v Young* (1788) 2 Esp 640n; *Stevens v Legh* (1853) 22 LTOS 84. The auctioneer may pay over to the vendor even when the latter is insolvent: *White v Bartlett* (1832) 9 Bing 378.

5 *Burrough v Skinner* (1770) 5 Burr 2639; *Furtado v Lumley* (1890) 54 JP 407; *Edwards v Hodding* (1814) 5 Taunt 815.

6 *Stevens v Legh* (1853) 22 LTOS 84; *Murray v Mann* (1848) 2 Exch 538. See also para 212 ante.

7 As to auctioneers' lien see para 224 ante.

8 *Skinner v Trustee of the Property of Reed (a Bankrupt)* [1967] Ch 1194 at 1200, [1967] 2 All ER 1286 at 1289 per Cross J.

9 *Skinner v Trustee of the Property of Reed (a Bankrupt)* [1967] Ch 1194 at 1200, [1967] 2 All ER 1286 at 1289 per Cross J.

10 *Webb v Smith* (1885) 30 ChD 192, CA.

11 *Brown v Staton* (1816) 2 Chit 353; *Crosskey v Mills* (1834) 1 Cr M & R 298.

12 *Lee v Munn* (1817) 8 Taunt 45; *Harington v Hoggart* (1830) 1 B & Ad 577; *Gaby v Driver* (1828) 2 Y & J 549.

13 *Potters (a firm) v Loppert* [1973] Ch 399 at 414-415, [1973] 1 All ER 658 at 669 per Pennycuik V-C. Cf *Burt v Claude Cousins & Co Ltd* [1971] 2 QB 426, [1971] 2 All ER 611, CA. The view in *Potters (a firm) v Loppert* supra maintains the distinction between the position of one who takes as stakeholder and one who is an agent.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(2) THE DEPOSIT/251. Loss of deposit.

251. Loss of deposit.

Where the deposit is lost either by infraction of the auctioneer¹ or otherwise (for example, his insolvency) it would seem that the loss falls on the vendor rather than the purchaser². Whilst, in principle this seems to treat the auctioneer as though he were the vendor's agent, the rationale seems to be that it is the vendor who selects the auctioneer to be the stakeholder and must take the risk of loss occasioned by his lack of honesty or financial stability.

¹ For the meaning of 'auctioneer' see para 201 ante.

² The authorities are mainly fairly ancient and are not entirely compelling. See *Fenton v Browne* (1807) 14 Ves 144 (but there the auctioneer clearly held the deposit as agent of the vendor, and where, as will be the case in the absence of specific provision, he holds it as stakeholder the position should be that risk should fall on whichever party ultimately becomes entitled to it); *Smith v Jackson and Lloyd* (1816) 1 Madd 618 (vendor treated as having the benefit of the stake because it was part payment and he could require investment of it: the first rationale is not convincing, where, as here, completion did not take place and the second justification is, it is submitted, wrong); *Rowe v May* (1854) 18 Beav 613 (but there the auctioneer seems to have been treated as agent of the vendor rather than the stakeholder). As to auctioneers as stakeholders see para 250 ante.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(3) AUCTIONEER'S LIABILITIES TO PURCHASER/252. Liability on contract of sale.

(3) AUCTIONEER'S LIABILITIES TO PURCHASER

252. Liability on contract of sale.

Where an auctioneer¹ sells for an undisclosed principal, he is personally liable on the contract². Where an auctioneer discloses the fact that he is selling as an agent³, but does not name his principal, he is personally liable on the contract unless a contrary intention appears, the presumption being that the purchaser is only willing to contract with the unknown man if the auctioneer makes himself personally liable. This presumption does not, however, arise in the case of the sale of a specific chattel which the purchaser knows is not the auctioneer's property⁴.

The extent of his liability and the nature of his obligations, for example, as to warranty of title or delivery of the property sold, must in each case depend on the contract of sale and the circumstances of the case⁵. He does not, however, make himself a party to the contract of sale as does an agent acting for an undisclosed principal when he acts merely for an unidentified one⁶, and it seems that the extent of the liability is one for non-delivery⁷. The duty to deliver is the other side of the coin that gives the auctioneer the right to sue for the price⁸.

Contracts for the sale or other disposition of an interest in land made at public auction⁹ are now both valid and enforceable on the fall of the hammer without writing or evidence in writing¹⁰. It is possible to provide that such a contract is merely a contract to enter into a written agreement of sale. In such circumstances the auctioneer might be empowered to sign the second, written contract of sale on behalf of the vendor¹¹ and it is possible for the auctioneer to sign in such a way that he attracts personal liability on the contract¹².

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Hanson v Roberdeau* (1792) Peake 120; *Franklyn v Lamond* (1847) 4 CB 637; *Evans v Evans* (1835) 3 Ad & El 132. See *Page v Sully* (1918) 63 Sol Jo 55. Whilst this may be regarded as axiomatic since the purchaser is unaware of the fact of the agency, there have been dicta to the contrary on the basis that an auctioneer can only sell another's property: see eg *Mainprice v Westley* (1865) 6 B & S 420 at 429 per Blackburn J. That view is clearly erroneous, for an auctioneer can sell his own property: *Flint v Woodin* (1852) 9 Hare 618.

3 As to agency of auctioneers see para 206 ante.

4 *Benton v Campbell, Parker & Co* [1925] 2 KB 410 at 414-415 per Salter J. There are dicta in *Mainprice v Westley* (1865) 6 B & S 420 suggesting that the auctioneer may escape liability by contracting merely as agent without disclosing his principal's name.

5 *Wood v Baxter* (1883) 49 LT 45; *Payne v Elsdon* (1900) 17 TLR 161; *Salter v Woollams* (1841) 2 Man & G 650.

6 *Wood v Baxter* (1883) 49 LT 45.

7 *Wood v Baxter* (1883) 49 LT 45. See *Hanson v Roberdeau* (1792) Peake 120 and *Franklyn v Lamond* (1847) 4 CB 637 (where failure to deliver was, in each case, the complaint). *Benton v Campbell, Parker & Co* [1925] 2 KB 410 establishes that the auctioneer does not give any warranty as to title, save that he knows of no defect in that of the vendor. See *Rainbow v Howkins* [1904] 2 KB 322 at 325, DC, preferring *Woolfe v Horne* (1877) 2 QBD 355 to *Mainprice v Westley* (1865) 6 B & S 420 ('We are of opinion, on the authority of *Woolfe v Horne*, which is a more recent decision than *Mainprice v Westley*,...that an action for wrongful refusal to deliver a chattel sold at public auction may in some circumstances successfully be brought against the auctioneer, although the principal's name is disclosed to the buyer at the time of the sale').

8 *Benton v Campbell, Parker & Co* [1925] 2 KB 410. As to when auctioneers may sue in their own name see para 258 post.

9 For the meaning of 'auction' see para 201 ante.

10 See para 206 note 5 ante.

11 As now permitted by the Law of Property (Miscellaneous Provisions) Act 1989 s 2(3): see **SALE OF LAND** vol 42 (Reissue) para 29 et seq. The power previously was only to sign the evidentiary memorandum under the Law of Property Act 1925 s 40 (now repealed).

12 See *Fisher v Marsh* (1865) 6 B & S 411. The statutory power enabling contracts for the sale of land to be signed by agents is novel and it remains to be seen what the ambit of such a liability might be.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(3) AUCTIONEER'S LIABILITIES TO PURCHASER/253. Independent contractual liability.

253. Independent contractual liability.

In some circumstances an auctioneer¹ will be held to have incurred independent direct contractual liability to the purchaser. Where the conditions of sale provide that the auctioneer will repurchase goods, for example where a work of art turns out to be a forgery, this will give rise to contractual rights against the auctioneer².

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Marie Zeligier de Balkany v Christie, Manson & Woods Ltd* (1995) 16 Tr LR 163.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(3) AUCTIONEER'S LIABILITIES TO PURCHASER/254. Auctioneer joined as defendant.

254. Auctioneer joined as defendant.

If the auctioneer¹ is made a defendant to a claim by the purchaser for specific performance or rescission, he will in general be dismissed from the claim on paying the balance of the deposit into court after deducting his charges, but he will not be so dismissed if relief is claimed against him personally on some ground, such as his misconduct at the auction².

¹ For the meaning of 'auctioneer' see para 201 ante.

² *Heatley v Newton* (1881) 19 ChD 326, CA (where the allegations involved fraud so that payment into court of the deposit did not discharge the auctioneer). See *Annesley v Muggridge* (1816) 1 Madd 593; *Yates v Farebrother* (1819) 4 Madd 239 (both cases involving suits by vendors for the deposit, but the principles apply equally to claims by the purchaser). In *Earl of Egmont v Smith* (1877) 6 ChD 469 it was suggested that if the deposit was small, the defendant should be joined only if he does not pay the sum into court.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(3) AUCTIONEER'S LIABILITIES TO PURCHASER/255. Breach of warranty of authority and fraud.

255. Breach of warranty of authority and fraud.

Where an auctioneer¹ sells property without or in excess of his authority, he is, like other agents, liable to the purchaser for breach of warranty of authority². Where the auctioneer sells goods of which his principal is not the true owner, a liability in conversion³ will arise, and if the purchaser finds himself sued by the true owner he may in turn seek to recover from the auctioneer. The auctioneer will only be liable for breach of warranty as to his vendor's title if he has expressly warranted it⁴.

The purchaser is entitled to sue the auctioneer personally for any fraud to which the auctioneer is privy⁵.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Anderson v John Croall & Sons Ltd* (1904) 6 F 153. See *Fay v Miller, Wilkins & Co* [1941] Ch 360, [1941] 2 All ER 18, CA, where the auctioneers were liable to the purchaser for breach of warranty of authority in knocking the property down below the reserve because they took the further step of signing the then required memorandum in writing on his behalf. This was said to waive the conditional nature of the bid and its acceptance. Now that the memorandum is no longer required (see para 206 note 5 ante) and both land and chattel sales are effected at the fall of the hammer, the position would seem to be the same in both types of sale, namely that purporting to sell under a reserve when the purchaser is on notice either of the existence of one or of the right of the vendor to fix one, will not give rise to liability on the part of the auctioneer for breach of warranty of authority. As to warranty of an agents' authority see **AGENCY** vol 1 (2008) PARAS 160-161.

3 As to auctioneers' liability for conversion see para 226 ante.

4 See para 226 ante.

5 *Heatley v Newton* (1881) 19 ChD 326, CA.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(3) AUCTIONEER'S LIABILITIES TO PURCHASER/256. Liability as bailee.

256. Liability as bailee.

Normally specific goods are sold at auction¹. In such sales property in the goods will, unless a contrary intention appears, pass to the buyer on the fall of the hammer². Thereafter, the goods will belong to the purchaser. If, as is sometimes provided by the auction conditions, the purchaser is entitled to a certain time to collect the goods, in the interim the auctioneer³ will hold them as bailee for him⁴. He will then be under a duty to take reasonable care of them⁵. If the property and risk in the goods does not pass to the purchaser until, say, he has paid for and collected them, there will be no such liability on the part of the auctioneer to the purchaser, but he will remain bailee for the vendor, whose goods they still are.

1 For the meaning of 'auction' see para 201 ante.

2 See the Sale of Goods Act 1979 s 18 r 1; and *Dennant v Skinner and Collom* [1948] 2 KB 164, [1948] 2 All ER 29.

3 For the meaning of 'auctioneer' see para 201 ante.

4 As to bailment generally see **BAILMENT**.

5 The auctioneer's duty is not that of a bailee for reward see **BAILMENT**.

UPDATE

256-257 Liability as bailee, Liability for misrepresentation

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(3) AUCTIONEER'S LIABILITIES TO PURCHASER/257. Liability for misrepresentations.

257. Liability for misrepresentations.

Whilst the auctioneer¹ will not incur personal civil liability to the purchaser for misrepresentations under the Misrepresentation Act 1967², there seems no reason in principle why he should not, in appropriate circumstances, be liable in tort to the purchaser for deceit³, negligent misstatement⁴ or contractually on a collateral warranty where he induces the formation of the contract of sale by making a false representation⁵.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Resolute Maritime Inc v Nippon Kaiji Kyokai, The Skopas* [1983] 2 All ER 1, [1983] 1 WLR 857. As to the Misrepresentation Act 1967 see **MISREPRESENTATION AND FRAUD**.

3 See *Derry v Peek* (1889) 14 App Cas 337, 58 LJ Ch 864, HL; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) para 789 et seq; **TORT** vol 97 (2010) PARA 519.

4 See *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) para 798; **NEGLIGENCE** vol 78 (2010) PARA 14.

In *McCullagh v Lane Fox & Partners Ltd* (1995) 49 ConLR 124, [1996] 1 EGLR 35, CA, it was held that an estate agent who misrepresented the acreage of a property was not liable to the purchaser; the agent's immunity stemmed partly from a finding that it was not reasonable for the purchaser to rely on the agent rather than his own surveyor and partly from an effective disclaimer of liability which, in the circumstances, was held to be reasonable under the Unfair Contract Terms Act 1977 (see **CONTRACT** vol 9(1) (Reissue) para 790 et seq). However, the same reasoning may not apply to an auctioneer selling property where sales are not subject to contract and where it may not be reasonable to put the purchaser to his own inquiries. Where a disclaimer is found to be reasonable under the Unfair Contract Terms Act 1977, it may still be void as unfair under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended) (see **CONTRACT**). See also *Duncan Investments Ltd v Underwoods (a firm)* [1998] EGCS 98, [1998] 6 PNL 754, CA, (where a similar disclaimer as the one in *McCullagh v Lane Fox & Partners* supra was held ineffective; the agent went beyond the advice normally given on behalf of a vendor in connection with the sale).

5 See *Andrews v Hopkinson* [1957] 1 QB 229, [1956] 3 All ER 422; and **CONTRACT** vol 9(1) (Reissue) para 767.

UPDATE

256-257 Liability as bailee, Liability for misrepresentation

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/ (4) AUCTIONEER'S RIGHTS AGAINST PURCHASER/258. When auctioneer may sue in own name.

(4) AUCTIONEER'S RIGHTS AGAINST PURCHASER

258. When auctioneer may sue in own name.

An auctioneer¹ may, by reason of his lien² on or special property in goods, maintain a claim in his own name for the price of goods sold and delivered by him³. This is so even where he sells and delivers as agent⁴ for a disclosed principal⁵, but this right does not extend, in the absence of special contract, to suing for the purchase money of land if he sells as agent for a disclosed principal⁶, or for the use and occupation of land let by him by auction⁷.

There are dicta which suggest that the right to sue, apart from those cases where the auctioneer sues on a quite separate contract, is dependant on the continued existence of the lien⁸. However, it is suggested that the better view is that it arises out of the lien but does not depend on continued possession; where, as is often the case, the auctioneer wishes to sue just because he has parted with the possession, which is the basis of the lien, he sues on an implied contract arising out of the delivery without payment⁹.

Where the auctioneer is suing on his own account and not merely for the principal, as where he has already accounted for the sale price to him, he will be unaffected by any set-off which the purchaser may have against the vendor¹⁰. If the auctioneer can be taken to have assented to such a settlement or had notice not to account to the vendor, he may be disentitled to recover from the purchaser¹¹. He will also be unable to recover if it has been agreed that the price should be satisfied otherwise than by payment¹².

Once, however, the auctioneer has been paid his fees and charges he cannot recover in circumstances where there is a set-off, since he is then merely suing for his principal¹³. Where the goods sold are not the property of the vendor, and are claimed by the true owner before payment by the purchaser, the auctioneer cannot maintain a claim for the price even though the purchaser has taken away the goods under an express promise to pay¹⁴.

1 For the meaning of 'auctioneer' see para 201 ante.

2 As to auctioneers' lien see para 224 ante.

3 *Williams v Millington* (1788) 1 Hy Bl 81. See *Benton v Campbell, Parker & Co Ltd* [1925] 2 KB 410 at 416 per Salter J ('The auctioneer sues for the price by virtue of his special property and his lien, and also, in most cases, by virtue of his contract with the buyer, that the price shall be paid into his hands, and not by virtue of the contract of sale'). See also *Wilson & Sons v Pike* [1949] 1 KB 176 at 182, [1948] 2 All ER 267 at 269, CA, per Tucker LJ. This right to sue in his own name does not impose a duty obtain the purchase money: *Fordham v Christie, Manson & Woods Ltd* (1977) 121 Sol Jo 529, 244 Estates Gazette 213. Note that the auctioneer's right extends to the whole price, not merely that necessary to cover his own charges: *Chelmsford Auctions Ltd v Poole* [1973] QB 542, [1973] 1 All ER 810, CA.

4 As to agency of auctioneers see para 206 ante.

5 *Williams v Millington* (1788) 1 Hy Bl 81. See *Freeman v Farrow* (1886) 2 TLR 547, where an auctioneer was held entitled to sue even where the sale was effected by the owner himself on the auctioneer's premises, the contract having specifically provided therefor. However, in sales outside the ring in cattle auctions the analysis is different: see *Murphy v Howlett* (1960) 176 Estates Gazette 311. See also *Mackenzie v Cormack* 1950 SC 183, where it was held that an auctioneer, although acting on behalf of a disclosed principal, could sue the purchaser for the payment of the price of the goods sold to him irrespective of whether the sale was conducted in the auction room or on the vendor's premises.

In *Cleave v Moore* (1857) 28 LTOS 255, and *Hodgens v Keon* [1894] 2 IR 657, an auctioneer who had taken an IOU in respect of a deposit on the sale of land was allowed to sue the purchaser, but the ratio decidendi was that by so doing the auctioneer had in fact advanced the money to the purchaser. See also *Robinson, Fisher and Harding v Behar* [1927] 1 KB 513. In this situation the auctioneer's rights to sue are unaffected by factors vitiating the contract of sale: *Hindle v Brown* (1907) 98 LT 44; affd (1908) 98 LT 791, CA. Where a purchaser fails to pay the deposit as required by the conditions of sale, the auctioneer may put up the property for sale again and the purchaser will be denied specific performance: *Morrow v Carty* [1957] NI 174.

6 *Cherry v Anderson* (1876) IR 10 CL 204.

7 *Evans v Evans* (1835) 3 Ad & El 132; *Fisher v Marsh* (1865) 6 B & S 411. For the meaning of 'auction' see para 201 ante.

8 *Coppin v Walker* (1816) 7 Taunt 237. See note 9 infra.

9 *Coppin v Craig* (1816) 7 Taunt 243. *Coppin v Walker* (1816) 7 Taunt 237 can be explained on the basis that the auctioneer's actions negated any such implication of a contract.

10 *Robinson v Rutter* (1855) 4 E & B 954; *Manley & Sons Ltd v Berkett* [1912] 2 KB 329.

11 *Grice v Kenrick* (1870) LR 5 QB 340.

12 *Bartlett v Purnell* (1836) 4 Ad & El 792.

13 *Holmes v Tutton* (1855) 5 E & B 65; *Manley & Sons Ltd v Berkett* [1912] 2 KB 329.

14 *Dickenson v Naul* (1833) 4 B & Ad 638.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(5) SALES GIVING RISE TO CRIMINAL SANCTIONS/259. Misdescribed goods.

(5) SALES GIVING RISE TO CRIMINAL SANCTIONS

259. Misdescribed goods.

An auctioneer¹ who, in the course of a trade or business, applies a false trade description to any goods or supplies or offers to supply any goods to which a false trade description is applied, is guilty of an offence².

It is possible to attempt to disclaim the description (as is often done with regard to odometer readings in auctions of second-hand motor cars), but to avoid liability under the Trade Descriptions Act 1968 it is necessary that such a disclaimer be as bold, precise and compelling as the description itself and brought to the notice of any person to whom the goods may be supplied³. Disclaimers which take the form of an assurance that all care is taken to describe a lot accurately, commonplace in art sales where questions of attribution may be crucial, may be effective, but the assurance may itself give rise to criminal sanctions if such care has not, in fact, been taken, and it will then potentially be a false description as to services⁴.

An auctioneer will be able to rely on the defences of mistake or accident if he can show that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control, and that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control⁵.

Where an estimate or price guide is provided and the lowest in the estimated range is in fact below a set reserve, the estimate is a misleading indication of the price at which the goods are available contrary to the Consumer Protection Act 1987⁶.

1 For the meaning of 'auctioneer' see para 201 ante.

2 See the Trade Descriptions Act 1968 s 1(1); *May v Vincent* (1990) 154 JP 997, [1991] 1 EGLR 27, DC; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 475 et seq. As to prohibited sales generally see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) paras 49-53.

3 *Norman v Bennett* [1974] 3 All ER 351, [1974] 1 WLR 1229, DC.

4 See the Trade Descriptions Act 1968 s 14; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 495.

5 See *ibid* s 24; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 504.

6 See the Consumer Protection Act 1987 s 20 (amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 309); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 702. However, this only applies where the buyer acts as a consumer: see the Consumer Protection Act 1987 s 20(6).

UPDATE

259-264 Misdescribed goods ... Wild birds, wild animals and endangered species

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning

of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

259-262 Misdescribed goods ... Unsafe and dangerous goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

259 Misdescribed goods

TEXT AND NOTES 1-4--Trade Descriptions Act 1968 ss 1(1), 14, Consumer Protection Act 1987 s 20 repealed: SI 2008/1277. Provision for made for the prohibition of unfair commercial practices by the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277; see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 725A.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(5) SALES GIVING RISE TO CRIMINAL SANCTIONS/260. Misdescribed land.

260. Misdescribed land.

The Property Misdescriptions Act 1991 provides similar protection in respect to misdescribed land as the Trade Descriptions Act 1968¹ does in respect of misdescribed goods². Where a false³ or misleading statement⁴ about a prescribed matter⁵ is made by an auctioneer⁶ in the course of an estate agency business⁷, the person by whom the business is carried on is guilty of an offence⁸. Where the making of the statement is due to the act or default of an employee, the employee is guilty of an offence, and the employee may be proceeded against and punished whether or not proceedings are also taken against his employer⁹. In proceedings against a person for such an offence it is a defence for him to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence¹⁰.

An estimate of the likely price of a lot which is below the reserve may amount to a misleading statement about the price¹¹.

1 See para 259 ante.

2 As to false or misleading statements in relation to property see further **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) paras 791-800.

3 For these purposes, 'false' means false to a material degree: Property Misdescriptions Act 1991 s 1(5)(a).

4 For these purposes, a statement is misleading if (though not false) what a reasonable person may be expected to infer from it, or from any omission from it, is false: *ibid* s 1(5)(b). For these purposes, a statement may be made by pictures or any other method of signifying meaning as well as by words and, if made by words, may be made orally or in writing: s 1(5)(c).

5 For these purposes, a prescribed matter is any matter relating to land which is specified in an order made by the Secretary of State: *ibid* s 1(5)(d). As to the Secretary of State see para 204 note 12 ante. An order under s 1 may make different provision for different cases, and include such supplemental, consequential and transitional provisions as the Secretary of State considers appropriate: s 1(7). The power to make such an order is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 1(7). In exercise of the power under s 1 the Property Misdescriptions (Specified Matters) Order 1992, SI 1992/2834 has been made: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 792.

6 For the meaning of 'auctioneer' see para 201 ante.

7 For these purposes, a statement is made in the course of an estate agency business if (but only if) the making of the statement is a thing done as mentioned in the Estate Agents Act 1979 s 1(1) (see **AGENCY** vol 1 (2008) PARA 240; **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 790) and the Estate Agents Act 1979 either applies to it or would apply to it but for s 1(2)(a) (as amended) (exception for things done in course of profession by practising solicitor or employee) (see **AGENCY** vol 1 (2008) PARA 241); Property Misdescriptions Act 1991 s 1(5)(e). For the purposes, any reference in s 1 or the Estate Agents Act 1979 s 1 (as amended) to disposing of or acquiring an interest in land is to be construed in accordance with s 2 (see **AGENCY** vol 1 (2008) PARA 240); Property Misdescriptions Act 1991 s 1(6).

8 See *ibid* s 1(1). A person guilty of an offence under s 1 is liable on summary conviction, to a fine not exceeding the statutory maximum, and on conviction on indictment, to a fine: s 1(3). The 'statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140. As to the prescribed sum see para 245 note 10 ante.

No contract is void or unenforceable, and no right of action in civil proceedings in respect of any loss arises, by reason only of the commission of an offence under the Property Misdescriptions Act 1991 s 1: see s 1(4).

9 *Ibid* s 1(2). See note 8 supra.

10 Ibid s 2(1). As to the defence of due diligence see further s 2(2)-(4); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 793.

11 See the Property Misdescriptions (Specified Matters) Order 1992, SI 1992/2834, art 2, Schedule para 16. This does not apply to new dwellings or to commercial property: Schedule para 16 proviso. New dwellings are covered by Consumer Protection Act 1987: see s 20 (as amended); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 702 et seq.

UPDATE

259-264 Misdescribed goods ... Wild birds, wild animals and endangered species

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

259-262 Misdescribed goods ... Unsafe and dangerous goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(5) SALES GIVING RISE TO CRIMINAL SANCTIONS/261. Unhallmarked gold, silver or platinum.

261. Unhallmarked gold, silver or platinum.

An auctioneer¹ is guilty of an offence, which is one of strict liability², if in the course of his trade or business he applies to an unhallmarked item a description indicating that it is wholly or partly made of gold, silver or platinum, or if he supplies or offers to supply an unhallmarked article to which such a description is applied³. Goods are unhallmarked if they do not bear the approved hallmarks and the sponsor's mark, or if they have been the subject of improper alteration⁴. Problems may be encountered particularly with imported items, especially those manufactured in countries where there exists self-regulatory hallmarking, the items being marked by the manufacturer rather than some official assay office.

1 For the meaning of 'auctioneer' see para 201 ante.

2 *Chilvers v Rayner* [1984] 1 All ER 843, [1984] 1 WLR 328, DC.

3 See the Hallmarking Act 1973 s 1(1). See generally **TRADE AND INDUSTRY** vol 97 (2010) PARA 808 et seq.

4 See *ibid* s 2(4).

UPDATE

259-264 Misdescribed goods ... Wild birds, wild animals and endangered species

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

259-262 Misdescribed goods ... Unsafe and dangerous goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(5) SALES GIVING RISE TO CRIMINAL SANCTIONS/262. Unsafe and dangerous goods.

262. Unsafe and dangerous goods.

The Consumer Protection Act 1987 makes it an offence to sell or possess for the purposes of sale a wide range of goods which are unsafe or do not conform to certain standards¹. It is also specifically an offence to sell pharmaceuticals². Auctioneers undertaking 'household clearances' need to be particularly on guard.

1 See the Consumer Protection Act 1987; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 528 et seq. Whereas the Consumer Protection Act 1961 (repealed) contained a specific exception for those, such as auctioneers, selling as agents, the later Acts do not. For the meaning of 'auctioneer' see para 201 ante.

There are numerous consumer protection measures made by the European Union: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 393. See eg EC Council Directive 92/59 (OJ L228, 11.8.92, p 24) on general product safety, which is implemented in the United Kingdom by the General Product Safety Regulations 1994, SI 1994/2328 (as amended). These regulations apply to secondhand products (although not to those sold as antiques): see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 565 et seq.

2 See the Medicines Act 1968; and **MEDICINAL PRODUCTS AND DRUGS**.

UPDATE

259-264 Misdescribed goods ... Wild birds, wild animals and endangered species

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

259-262 Misdescribed goods ... Unsafe and dangerous goods

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

262 Unsafe and dangerous goods

NOTE 1--SI 1994/2328 replaced by the General Product Safety Regulations 2005, SI 2005/1803 which implement EC Council Directive 2001/95 (OJ L11, 15.1.2004, p 4).

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(5) SALES GIVING RISE TO CRIMINAL SANCTIONS/263. Unroadworthy vehicles.

263. Unroadworthy vehicles.

It is an offence for an auctioneer¹ to sell or supply, or to offer to sell or supply, or to expose for sale unroadworthy vehicles². An auctioneer may not be convicted of an offence in respect of the supply of a motor vehicle or trailer if he proves that it was supplied or altered, as the case may be, for export from Great Britain³, or that he had reasonable cause to believe that the vehicle or trailer would not be used on a road in Great Britain or would not be so used until it had been put into a condition in which it might lawfully be so used⁴. If such a vehicle is sold, the contract made at auction is not invalidated by any infringement of the statutory provisions⁵.

1 For the meaning of 'auctioneer' see para 201 ante.

2 See the Road Traffic Act 1988 s 75 (amended by the Road Traffic Act 1991 ss 16(2), (3), (4), (5), 83, Sch 8); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) para 810; **ROAD TRAFFIC** vol 40(2) (2007 Reissue) para 694. A person guilty of an offence under the Road Traffic Act 1988 s 75 (as amended) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: Road Traffic Offenders Act 1988 ss 9, 33(1), Sch 2 Pt I. As to the standard scale see para 239 note 11 ante.

3 See the Road Traffic Act 1988 s 75(6)(a).

4 See *ibid* s 75(6)(b).

5 See *ibid* s 75(7).

UPDATE

259-264 Misdescribed goods ... Wild birds, wild animals and endangered species

Certain persons or indorsements mentioned in these paragraphs are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(5) SALES GIVING RISE TO CRIMINAL SANCTIONS/264. Wild birds, wild animals and endangered species.

264. Wild birds, wild animals and endangered species.

Except in relation to certain wild birds specified in the Wildlife and Countryside Act 1981¹, the sale or offering or exposing for sale of any live wild bird, or an egg or any part of such, or any dead wild bird or any part of, or anything derived from it, is an offence unless authorised under a licence by the appropriate authority². The position is the same with regard to certain live or dead wild animals³. Endangered species are dealt with, as to restrictions upon importation and exportation, by the Endangered Species (Import and Export) Act 1976, which subjects their sale to a licensing system⁴.

¹ See the Wildlife and Countryside Act 1981 s 6, Sch 3 (birds which may be sold): see **ANIMALS** vol 2 (2008) PARA 1007.

² See *ibid* ss 6(1), (2), 16(4) (s 6(2) amended by the Countryside and Rights of Way Act 2000 ss 81(1), 102, Sch 12 paras 3, 10(6), Sch 16 Pt IV); and **ANIMALS** vol 2 (2008) PARAS 1006, 1007, 1019. The 'appropriate authority' for these purposes is the Secretary of State: Wildlife and Countryside Act 1981 s 16(9)(b). As to the Secretary of State see para 204 note 12 *ante*.

A person guilty of an offence under s 6(1), (2) (as amended) or s 9(5) (see the text to note 3 *infra*) is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both: s 21(1) (substituted by the Countryside and Rights of Way Act 2000 Sch 12 para 10(1), (2), (6)). As to the standard scale see para 239 note 11 *ante*. Where an offence was committed in respect of more than one bird, nest, egg, other animal, plant or other thing, the maximum fine which may be imposed is determined as if the person convicted had been convicted of a separate offence in respect of each bird, nest, egg, animal, plant or thing: see the Wildlife and Countryside Act 1981 s 21(5) (amended by the Countryside and Rights of Way Act 2000 Sch 12 para 10(1), (5), Sch 16 Pt IV).

³ See the Wildlife and Countryside Act 1981 s 9(5), Sch 5 (as amended); and **ANIMALS** vol 2 (2008) PARA 1015. See note 2 *supra*.

⁴ See the Endangered Species (Import and Export) Act 1976; and **ANIMALS** vol 2 (2008) PARA 966 *et seq.*

UPDATE

264-265 Wild birds, wild animals and endangered species, Firearms and other offensive weapons

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(5) SALES GIVING RISE TO CRIMINAL SANCTIONS/265. Firearms and other offensive weapons.

265. Firearms and other offensive weapons.

It is an offence if by way of trade or business an auctioneer¹ sells, exposes for sale or transfer, or has in his possession for sale, any firearm² or ammunition³ to which the Firearms Act 1968 applies⁴ without being registered as a firearms dealer⁵ or obtaining a permit⁶ from the chief officer of police⁷ for the area⁸ in which the auction⁹ is held and complying with the terms of the permit¹⁰. It is an offence for a person to sell or transfer to any other person in the United Kingdom, other than a registered firearms dealer, any firearm or ammunition to which the Firearms Act 1968 applies¹¹, or a shot gun¹², unless that other produces a firearm certificate¹³ authorising him to purchase or acquire it or, as the case may be, his shot gun certificate, or shows that he is by virtue of the Firearms Act 1968 entitled to purchase or acquire it without holding a certificate¹⁴. A criminal offence is not committed under the Firearms Act 1968 in the sale of antique firearms sold, transferred, purchased, acquired or possessed as a curiosity or ornament¹⁵. Firearms are regarded as antique if they are 100 years old but they may be so regarded even if they are of less age¹⁶.

Other offensive weapons¹⁷ are treated separately¹⁸. It is an offence to sell or expose for sale such weapons, punishable on summary conviction by a term of imprisonment¹⁹ or a fine²⁰, or both²¹. There is a general exclusion for antiques, which are simply defined as weapons over 100 years old²².

1 For the meaning of 'auctioneer' see para 201 ante.

2 For the meaning of 'firearm' see para 204 note 7 ante. As to the law relating to firearms generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 630 et seq.

3 For the meaning of 'ammunition' see para 204 note 8 ante

4 I.e the Firearms Act 1968 s 1 (as amended): see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) paras 630-634.

5 See *ibid* s 3(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 636. For the meaning of 'firearms dealer' see para 204 note 9 ante; and for the meaning of 'registered' see para 204 note 9 ante.

6 I.e a permit in the form prescribed by the Secretary of State: *ibid* ss 9(2), 57(4). For the form of permit see the Firearms Rules 1998, SI 1998/1941, r 9(2)(a), Sch 4 Pt III (auctioneer's firearm and ammunition permit), r 9(2)(b), Sch 4 Pt IV (auctioneer's shot gun permit). As to the Secretary of State see para 204 note 12 ante.

7 As to the chief officer of police see **POLICE** vol 36(1) (2007 Reissue) para 178 et seq.

8 For the meaning of 'area' see para 204 note 11 ante.

9 For the meaning of 'auction' see para 201 ante.

10 See the Firearms Act 1968 s 9(2); and para 204 ante.

11 I.e *ibid* s 1 (as amended): see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) paras 630-634.

12 For the meaning of 'shot gun' see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 632.

13 For the meaning of 'certificate' see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 637.

14 Firearms Act 1968 s 3(2). However, it is not an offence under s 3(2) for a person: (1) to part with the possession of any firearm or ammunition, otherwise than in pursuance of a contract of sale or hire by way of gift or loan, to a person who shows that he is by virtue of the Firearms Act 1968 entitled to have possession of the firearm or ammunition without holding a certificate; or (2) to return to another person a shot gun which he has lawfully undertaken to repair, test or prove for the other: s 8(2).

15 See *ibid* s 58(2). It is not a defence that one has an honest belief that the firearm is an antique if in fact or law it is not: *R v Howells* [1977] QB 614, [1977] 3 All ER 417, CA; *R v Hussain* [1981] 2 All ER 287, [1981] 1 WLR 416, CA.

16 *Richards v Curwen* [1977] 3 All ER 426, [1977] 1 WLR 747; *Bennett v Brown* (1980) 71 Cr App Rep 109, DC. See, however, the comments of Watkins J in *Bennett v Brown* *supra* ('...no reasonable bench of justices could conclude, regardless of whether or not a firearm could be used in a war at any time, that a firearm which has been manufactured during this century is an antique.').

17 See the Criminal Justice Act 1988 (Offensive Weapons) Order 1988, SI 1988/2019, art 2, Schedule para 1 (amended by SI 2002/1668).

18 See the Criminal Justice Act 1988 s 141; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) para 702.

19 I.e a term of imprisonment not exceeding six months: see *ibid* s 141(1).

20 I.e a fine not exceeding level 5 on the standard scale: see *ibid* s 141(1). As to the standard scale see para 239 note 11 *ante*.

21 See *ibid* s 141(1).

22 See the Criminal Justice Act 1988 (Offensive Weapons) Order 1988, SI 1988/2019, Schedule para 2.

UPDATE

264-265 Wild birds, wild animals and endangered species, Firearms and other offensive weapons

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

265 Firearms and other offensive weapons

NOTE 17--SI 1988/2019 Schedule para 1 further amended: SI 2004/1271, SI 2008/973.

Halsbury's Laws of England/AUCTION (VOLUME 2(3) (REISSUE))/2. THE AUCTION SALE AND THE DEPOSIT/(5) SALES GIVING RISE TO CRIMINAL SANCTIONS/266. Sales of residential investment land.

266. Sales of residential investment land.

It is an offence to dispose of residential investment land in breach of the statutory provisions providing tenants with rights of first refusal¹.

¹ See the Landlord and Tenant Act 1987 s 10A(1) (added by the Housing Act 1996 s 91(1)). See para 239 ante. A person guilty of an offence under Landlord and Tenant Act 1987 s 10A (as added) is liable on summary conviction to a fine not exceeding level 5 on the standard scale: s 10A(2) (as so added). As to the standard scale see para 239 note 11 ante.